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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 381

JOHN R. BAKER, WILLIAM J. BRADSHAW, WILLIAM L. CAMPBELL, FRED W. GRUBER, CHARLES B. KIRCHER, EDWARD I. KWITCHOFF, ALEXANDER F. MANFREDI, CLYDE H. PETTIT, AND DICKSON WATSON,

Petitioners,

v.

THE UNITED STATES,

Respondent

ERNEST E. ROSENSTROM, CHARLES SIMONSON, AND OTTO UBELL,

Petitioners,

v.

THE UNITED STATES,

Respondent

JOSEPH PETROTTA,

Petitioner,

v.

THE UNITED STATES,

Respondent

JOHN F. SCHNEIDER AND SIDNEY J. SMITH,

Petitioners,

v.

THE UNITED STATES,

Respondent

JOINT PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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JOINT PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled cases on March 6, 1956.

Opinion Below

The opinion and order of the Court of Claims, together with its findings of fact and conclusions of law, are set forth in the Appendix to this petition. The opinion has not yet been officially reported.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1255. The order of the Court of Claims dismissing the petitions is set forth in the Appendix. A petition for a rehearing was denied in an order dated June 5, 1956.

Questions Presented

1. Does section 12 or section 14 of the Veterans Preference Act of 1944, as amended, govern the rights of veterans demoted pursuant to a reduction in force?

2. Did petitioners have a right to appeal to the Civil Service Commission at the time they were demoted pursuant to a reduction in force?

3. Must administrative remedies be exhausted when there is a clear violation of a statutory right and no disputed issues of relevant fact?

4. Does the doctrine of exhaustion of administrative remedies apply when the judicial remedy is entirely different from the administrative remedy and the judicial proceeding is not intended as a review of the administrative proceeding?

Statutes Involved

Section 12 of the Veterans Preference Act of 1944, 58 Stat. 390, 5 U.S.C. §861:

> "In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission

regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * *. *Provided further,* That preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below 'good' shall be retained in preference to competing non-preference employees who have equal or lower efficiency ratings: * * *"

Section 14 of the Veterans Preference Act of 1944, 58 Stat. 390, as amended, 61 Stat. 723, 5 U.S.C., Supp. V, §863:

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the adminis-

trative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of notice of such adverse decision: *Provided*, That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends: * * *"

Statement of the Case

These four cases involve similar facts and identical issues of law. They were consolidated for hearing and decision in the Court of Claims.[1] Petitioners[2] do not at this time attack the findings of fact made by the Court of Claims. These findings are included in the Appendix and will be cited in support of the statements of fact made herein.

Petitioners were civilian supervisory employees of the New York Naval Shipyard, Brooklyn, New York. Each of them was a veteran and a preference eligible as defined by the Veterans Preference Act of 1944, as amended. (F. 2,

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[1] *Adler, et al.* v. *United States*, No. 266-53, *Borriello, et al.* v. *United States*, No. 465-53, *Goldblatt, et al.* v. *United States*, No. 522-53, and *Johnson, et al.* v. *United States*, No. 640-53.

[2] Some parties to the petitions filed with the Court of Claims were allowed to summarily recover in *Adler* v. *United States*, 129 C. Cls. 150. Twenty-two of the remaining plaintiffs were concerned with the decision on the present phase of the cases. Of these, only 15 are parties to this petition. Somewhat different circumstances were involved in the cases of the other seven.

p. 27.) Reduction in force of nonsupervisory employees following termination of World War II made it necessary to demote some of the supervisors. Petitioners were therefore demoted in grade and salary, for the most part during the latter part of 1947 or early in 1948. (F. 4, p. 27.) Each of petitioners had an efficiency rating of "good" or better at the time of his demotion.[3] (F. 2, p. 27.) The parties stipulated before the Court of Claims and that Court found that at least one competing nonveteran with lower retention rights was retained by the Navy Department in the grade of each of petitioners. (F. 5, p. 28.) Since the demotions were pursuant to a reduction in force, this admittedly constituted a violation of the rights of petitioners under section 12 of the Veterans Preference Act of 1944. *Reynolds* v. *Lovett,* 201 F. 2d 181 (C.A.D.C.), cert. den. *sub nom., Wilson* v. *Reynolds,* 345 U.S. 926.

Although advised in writing at the time of their demotion that they had a right to appeal to the Civil Service Commission (F. 11, p. 30), none of petitioners appealed to the Commission. (F. 5, p. 28.) A few veterans demoted under similar circumstances did file appeals. These appeals were denied by the Commission on the ground that section 12 of the Veteran's Preference Act and the Commission's regulations thereunder were applicable only to discharged employees and not to those reduced in grade. This interpretation of Section 12 was rejected in *Reynolds* v. *Lovett, supra.* After that decision the Commission revised its regulations to conform with the court's holding. Cases in which appeals had been denied were reopened and those veterans who had appealed were ordered restored to their former jobs. (F. 9, p. 30.) The Court of Claims has awarded dam-

[3] The Court of Claims found that the record contains no evidence of the efficiency record of three of the petitioners. (Footnote 1 to F. 2, p. 27.) This failed to reflect a stipulation by the parties, filed September 1, 1955, that the three petitioners had an efficiency rating of "good" or better.

ages for loss of pay to employees who appealed to and were restored to their former positions by the Civil Service Commission. *Adler* v. *United States*, 129 C. Cl. 150.

Petitioners filed these actions with the Court of Claims at various times during 1953. They seek back pay for the period of service in lower grades from the date of demotion to the date of judgment. (F. 110, p. 55.) The jurisdiction of the Court of Claims is founded on 28 U.S.C. § 1491. The sole basis for the decision of the Court of Claims dismissing the petitions was that petitioners had not exhausted their administrative remedies because of their failure to appeal their demotions to the Civil Service Commission.

Reasons for Granting the Writ

Petitioners are veterans who were employed by the Navy Department as supervisors in a shipyard. They had an efficiency rating of "good" or better. Section 12 of the Veterans Preference Act of 1944, 58 Stat. 390, 5 U.S.C. § 861, provides that:

> "In any reduction in personnel in any civilian service of any Federal agency, . . . preference employees whose efficiency ratings are 'good' or better shall be retained in preference to all other competing employees . . . ."

Despite the clear command of this statutory provision, petitioners were demoted in grade and salary pursuant to a reduction in personnel while competing non-veterans were retained in their grade. Thus, petitioners were deprived of their veterans preference. Their illegal demotions to a lower grade substantially decreased their wages. Petitioners filed timely actions in the Court of Claims to recover this loss of wages, but were denied recovery because they

had not appealed their demotions to the Civil Service Commission.[4]

The ruling of the Court of Claims that petitioners could have appealed to the Civil Service Commission conflicts with decisions of the courts of appeals and other lower courts. It results from a confusion between the roles of section 12 and section 14 of the Veterans Preference Act. Moreover, even if it is assumed that petitioners had a right to appeal to the Civil Service Commission, the Court of Claims erred in holding that such an appeal had to be taken before these actions could be brought. Its decision in this regard also conflicts with decisions of the courts of appeals and other lower courts, and conflicts in principle with decisions of this Court. The issues involved are of great importance to all federal employees. Demotions pursuant to reductions in force have been a frequent occurrence in the past and may be expected to often occur in the future as budgetary and other considerations cause various governmental functions to diminish or cease altogether. The conflicts and confusion resulting from the decision of the Court of Claims should be resolved by this Court.

1. *Petitioners Had No Administrative Remedy to Exhaust.* The Court of Claims ruled that petitioners failed to exhaust their administrative remedies. This, of course, implies that there was an administrative remedy available to petitioners. It has long been recognized that one need not pursue an inadequate administrative remedy before resorting to the courts. *Order of Conductors* v. *Swan,* 329 U.S. 520, 524-525; *United States* v. *Holpuch Co.,* 328 U.S. 234, 240; *United States* v. *Blair,* 321 U.S. 730, 736; *Smith* v. *Ill.*

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[4] Two earlier decisions by the Court of Claims are to the same effect. *Heffernan* v. *United States,* No. 313-53 (decided January 31, 1956); *Martilla* v. *United States,* 118 C. Cl. 177. Neither of the plaintiffs in those cases were represented by counsel and neither of them briefed or argued the question of exhaustion of administrative remedies.

Bell Tel. Co., 270 U.S. 587. A nonexistent remedy obviously is inadequate. *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 540-541; *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673. We shall demonstrate that petitioners in fact had no administrative remedy and that the Court of Claims' ruling to the contrary is in conflict with decisions of the courts of appeals and other courts as well as being in error.

The Court of Claims held that petitioners could have appealed their demotions pursuant to a reduction in force to the Civil Service Commission under section 14 of the Veterans Preference Act of 1944, 58 Stat. 390, as amended, 61 Stat. 723, 5 U.S.C., Supp. V, § 863. The court stated that (Appendix, p. 24):

> "The statute in question here (58 Stat. 390; 61 Stat. 723; 5 U.S.C. Supp. V, 863) does not make an appeal to the Civil Service Commission a prerequisite to the bringing of a suit by a discharged or demoted employee. The statute provides that the employee 'shall have the right to appeal' to the Civil Service Commission. The applicable Civil Service Commission regulation provides that such an employee 'may appeal,' etc. Neither the statute nor the regulation says that he *shall* do so.
>
> "But, notwithstanding the fact that the appeal is not mandatory, we think that an employee must appeal to the Civil Service Commission for an adjustment of his grievances before resorting to the courts, except in unusual circumstances."

The Court of Claims thus cited and quoted from section 14 as the "statute in question here."

In fact, however, the statute in question is not section 14 of the Veterans Preference Act but section 12 of that Act, 58 Stat. 390, 5 U.S.C. § 861. Section 14 specifies the rights

of employees who are discharged, suspended, furloughed, demoted, or debarred from future appointment "for cause." Section 12, on the other hand, governs the preference to be accorded veterans in connection with releases (including both separations and demotions) pursuant to "any reduction in personnel." It is undisputed that petitioners' demotions resulted from a reduction in personnel and were not for cause.

The importance of this error to the decision of the Court of Claims that petitioners failed to exhaust their administrative remedies results from the fact that while section 14 expressly provides for an appeal to the Civil Service Commission to protect the rights granted by that section, section 12 does not provide for an appeal to the Commission or any other administrative agency to protect the rights granted by that section. Section 12 provides only that "competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings." The Civil Service Commission regulations in effect at the time petitioners were demoted provided that veterans preference eligibles *separated* from employment pursuant to a reduction in force "may appeal to the appropriate office of the Civil Service Commission."[5] The regulations did not then contain

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[5] § 20.1 *Extent of part.* The regulations in this part establish degrees of retention preference and uniform rules for reductions in force. . . .

§ 20.2 *Definitions.* For the purpose of the regulations in this part definitions are given for words, terms, and phrases as follows:

(a) "Reduction in force" means the involuntary separation from the rolls of a department, or furlough in excess of thirty days, of one or more employees in order to reduce personnel. . . .

§ 20.9 *Actions.* Employees who cannot be retained in their positions because of a reduction in force shall be separated, except as provided below. . . .

§ 20.10 *Notice to employees.* . . .

Each employee affected by reduction in force shall be given an indi-

any provision for an appeal to the Commission by employees *demoted* pursuant to a reduction in force such as these petitioners. This has since been changed,[6] but too late to be of any aid to petitioners.

The Court of Claims did not explain its holding that section 14 is "the statute in question here," even though petitioners' only substantive contention was that they had been deprived of the mandatory veterans preference provided in section 12 when they were demoted pursuant to a reduction in force. There are two possible explanations

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vidual notice in writing at least 30 days before the action becomes effective. . . . Notices to employees shall inform them of:

* * * * *

(c) His right to appeal the proposed action to the Commission . . . within 10 days from the receipt of notice. . . .

§ 20.13 *Appeals.* Any employee who feels that there has been a violation of his rights under the regulations in this part may appeal to the appropriate office of the Civil Service Commission within 10 days from the date he received his notice of the action to be taken. . . . 12 F.R. 2849-2852, 5 C.F.R. part 20 (1949 ed.).

[6] Significant provisions of the regulations now in force reflecting the revision to make the veterans preference applicable to demotions are as follows:

§ 20.2 *Definitions.* For the purposes of the regulations in this part definitions are given for words, terms, and phrases as follows:

(a) "Reduction in force" means the involuntary separation of an employee from a duty and pay status for more than thirty (30) days, by furlough or by separation from the rolls, in order to reduce personnel. . . .

* * * * *

(k) "Effective date" is the date an employee is separated, reduced in grade or pay, or furloughed, as the result of actions under the regulations in this part.

§ 20.5 *Actions*—(a) *In General.* Employees who cannot be retained in their positions because of a reduction in force will be changed to positions that will last as long as three (3) months, separated, or furloughed.

§ 20.6 *Notice to employees*—(a) *Proposed action.* Each employee who is to be separated from the rolls, furloughed for more than thirty (30) days, or reduced in grade or pay, in a reduction in force, under the regulations in this part, shall be given a notice in writing. . . . 19 F.R. 8618, 5 C.F.R. Part 20 (1956 Cum. Supp.).

of the holding of the Court of Claims. One explanation is that the Court of Claims has adopted the position that section 12 does not apply to demotions pursuant to a reduction in force, but only to separations, and consequently that the only substantive issue in the cases is whether petitioners were demoted "for such cause as will promote the efficiency of the service" within the meaning of section 14. The other possible explanation is that the Court of Claims is of the view that the veterans preference provided in section 12 is applicable to demotions pursuant to a reduction in force, but that the procedural guarantees provided in section 14, including the right to appeal to the Civil Service Commission, are available to employees deprived of their section 12 rights by a reduction in force. Whichever explanation is accepted, the decision of the Court of Claims is clearly erroneous and is in square conflict with decisions of the courts of appeals and the federal district courts.

If the opinion of the Court of Claims is interpreted to mean that employees demoted pursuant to a reduction in force are not entitled to the veterans preference provided in section 12 and must look to section 14 for their rights, its position conflicts with the decision in *Reynolds* v. *Lovett*, 201 F.2d 181 (C.A.D.C.), cert. den. *sub. nom.*, *Wilson* v. *Reynolds*, 345 U.S. 926. The *Reynolds* case held that demotions resulting from reductions in force are "releases" coming within the provisions of section 12, and consequently that veterans are entitled to the mandatory preference over competing non-veterans provided in that section. In so holding, the *Reynolds* case overruled the position of the Civil Service Commission that section 12 applied only to separations from employment due to a reduction in force and not to demotions. The Commission has since conceded that demoted veterans are entitled to the section 12 pref-

erence and amended its regulations to give effect to the *Reynolds* decision.[7]

Moreover, the decision of the court of appeals in *Reynolds* is clearly correct. Prior to the enactment of the Veterans Preference Act of 1944, veterans were entitled to an absolute preference over non-veterans in connection with discharges or demotions pursuant to a reduction in force under the Act of August 23, 1912, 37 Stat. 360, 413, and various executive orders. *Hilton* v. *Sullivan*, 334 U.S. 323, 336-337. And as was held in *Hilton* v. *Sullivan*, *supra* at p. 337, the purpose of the Congress in replacing previous legislation with the Veterans Preference Act of 1944 was "to broaden rather than narrow the preference." See also, *id.* at pp. 338-339. Indeed, the Court of Claims held that demoted veterans are entitled to the section 12 preference in *Adler* v. *United States*, 129 C.Cl. 150, granting summary judgment to some of the plaintiffs (other than petitioners) to three of the complaints concerned in this petition.

If, on the other hand, the opinion of the Court of Claims is interpreted to mean that petitioners were entitled to a veterans preference under section 12 since they were demoted pursuant to a reduction in force rather than for cause, but that they could and should have protected those rights by an appeal to the Civil Service Commission under section 14, the court is equally in error and in conflict with decisions of the courts of appeals and other courts. Section 14 provides various procedural rights to employees subject to adverse personnel action *for cause* including 30 days written notice, a right to answer the charges stated in the notice, and a right to appeal to the Civil Service Commis-

[7] The regulations now in effect are set forth in footnote 6, *supra*. In addition, the Commission issued a temporary regulation authorizing employees who had attempted to appeal under section 14 prior to the decision in the *Reynolds* case to apply for reconsideration of the orders dismissing the appeals. 18 F.R. 4395.

sion. It has consistently been held that these procedural guarantees are not applicable to employees separated or demoted pursuant to a *reduction in force* which is governed by section 12. *Fass* v. *Gray*, 197 F. 2d 587, 592 (C.A.D.C.); *Ashley* v. *Ross*, 191 F. 2d 655 (C.A.D.C.); *Wettre* v. *Hague*, 168 F. 2d 825 (C.A. 1); *Laden* v. *Crosson*, 108 F. Supp. 240 (E.D. Pa.). This also has been the view of the Court of Claims in other cases. *Holcomb* v. *United States*, No. 97-55 (decided July 12, 1956); *Baxter* v. *United States*, 129 C. Cl. 254, 257, 136 F. Supp. 748, 750; *Schweizer* v. *United States*, 128 C. Cl. 456, 461, 121 F. Supp. 928, 931. Thus, the *Wettre* case expressly rejected the Government's contention that the plaintiffs' failure to appeal to the Civil Service Commission required that their complaint be dismissed for failure to exhaust their administrative remedies; the *Fass* case held that it was unnecessary to pass upon a contention of one of the plaintiffs that he had exhausted his administrative remedies even though he did not perfect a timely appeal to the Commission; and the *Laden* case ordered the plaintiff restored to duty even though an appeal to the Commission was still pending.

There is a direct conflict between the result of the decisions cited above and the decision of the Court of Claims in these cases. Moreover, the Court of Claims is clearly in error in holding that the provision for appeal to the Civil Service Commission in section 14 applies to employees demoted in a manner violating section 12. There is nothing in the legislative history of the Veterans Preference Act to indicate that the inclusion of an express right to appeal to the Commission in section 14 and the omission of such a right from section 12 was not done knowingly and intentionally. Whether or not there is "cause" for taking adverse personnel action against an employee under section 14 frequently involves an exercise of discretion by the Commission after a full investigation of all the facts and

circumstances. See *Blackmon* v. *United States*, 128 C. Cl. 288, 291, 120 F. Supp. 774, 776. This is a matter in which the administrative expertise of the Commission is peculiarly valuable.[8] The Congress may well have decided, on the other hand, that the relatively simple factual determinations involved in applying the veterans preference provisions of section 12 could be left to the agencies, subject to review by the Courts, at least in the absence of a Civil Service Commission regulation affording a right to appeal such determinations to the Commission.

But regardless of whether the Court of Claims or the other courts are correct, the conflict caused by the decision of the Court of Claims should be cleared up by this Court. Reductions in force of federal employees is a frequent occurrence, and many of these employees are veterans.[9] The extent of their preference under section 12 and the manner in which it is to be enforced should not be left in doubt, or depend upon which court obtains jurisdiction of the matter. Consequently, certiorari should be granted because of the importance of the issues involved as well as because of the conflict of decisions among the lower courts.

2. *The Doctrine of Exhaustion of Administrative Remedies Is Inapplicable Even if Petitioners Could Have Appealed to the Civil Service Commission.* We established in the prior section of this petition that petitioners could not have appealed the violation of their preference rights to the Civil Service Commission and, hence, that there was no administrative remedy for them to exhaust. In this section we shall demonstrate that the Court of Claims erred in dismissing petitioners' complaints for failure to exhaust their administrative remedies even assuming that peti-

[8] See Sen. Rep. No. 568, 80th Cong., 1st Sess., p. 3.

[9] At least one other case, with 76 plaintiffs, involving demotions of shipyard workers who did not appeal to the Civil Service Commission is now pending in the Court of Claims. *Bashein* v. *United States*, No. 476-53.

tioners could have appealed to the Civil Service Commission.

When "plaintiffs are able to show a clear violation of some incontestable right under a federal statute" they come within "an established exception to the general rule requiring exhaustion of administrative remedies." *Fitzpatrick* v. *Snyder*, 224 F. 2d 522, 525, (C.A. 1). This Court has recognized and applied this exception. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 93; *Order of Conductors* v. *Pitney*, 326 U.S. 561, 566; *Mont. Bank* v. *Yellowstone County*, 276 U.S. 499, 505. The exception has been applied by the lower courts in several cases arising under the Veterans Preference Act to retain jurisdiction even though the plaintiffs had not filed or completed appeals to the Civil Service Commission. *Wettre* v. *Hague*, 168 F. 2d 825 (C.A. 1); *Group* v. *Finletter*, 108 F. Supp. 327 (D.D.C.); *Reeber* v. *Rossell*, 91 F. Supp. 108, 112 (S.D. N.Y.); *Farrell* v. *Mooman*, 85 F. Supp. 125, 127 (N.D. Cal.); cf., *Hardy* v. *Rossell*, 135 F. Supp. 261, 266 (S.D. N.Y.); see *Johnson* v. *War Assets Administration*, 171 F. 2d 556, 558 (C.A. 7); *Breiner* v. *Wallin*, 79 F. Supp. 506, 508 (E. D. Pa.); contra, *Young* v. *Higley*, 220 F. 2d 487 (C.A. D.C.)

The *Wettre* case is typical and is remarkably similar to the instant cases. There several veterans who had not been accorded the preference provided by section 12 of the Veterans Preference Act sought to enjoin an agency from discharging them while retaining competing non-veterans. The district court dismissed the complaint because the plaintiffs had failed to appeal to the Civil Service Commission, 74 F. Supp. 396 (D. Mass.). While an appeal was pending, the decision in *Hilton* v. *Sullivan, supra*, established that the plaintiffs were correct on the merits. The Court of Appeals held that since the issue on the merits had become free from doubt, it was not necessary for plaintiff to pur-

sue any administrative remedies. This holding was explained and reaffirmed in *Fitzpatrick* v. *Snyder, supra.*

Petitioners fall squarely within the exception applied in the *Wettre* and similar cases cited above. The Government made no attempt to deny the validity of their contention on the merits that they were illegally demoted in violation of section 12 of the Veterans Preference Act. This contention had been established by the decision in *Reynolds* v. *Lovett, supra,* and was no longer open to serious doubt. All of the facts necessary to establish a violation of section 12 were uncontested—(1) petitioners were veterans with an efficiency rating of "good" or better; (2) they were demoted pursuant to a reduction in force; and (3) at least one competing non-veteran with lower retention rights was retained by the Navy Department in the grade of each of the petitioners. We submit, therefore, that there is a square conflict of decisions between that of the Court of Claims in these proceedings and the decisions in *Wettre* v. *Hague* and the other similar cases cited above. Furthermore, the decision of the Court of Claims also conflicts in principle with the decisions of this Court holding that administrative remedies need not be exhausted when there is a clear violation of some right under a federal statute.

The doctrine of exhaustion of administrative remedies is even more clearly inapplicable to a suit for back pay brought in the Court of Claims under the circumstances of these cases than to a suit for reinstatement brought in a federal district court. The Civil Service Commission can order reinstatement of federal employees removed from their positions in a manner violating the terms of the Veterans Preference Act, but cannot award money damages for loss of back pay resulting from the illegal personnel action. 33 Comp. Gen. 192; 29 Comp. Gen. 209; 28 Comp. Gen. 489; see *Armand* v. *United States,* No. 1-52 (C.Cl.,

decided July 12, 1956).[10] Therefore, an action for reinstatement brought in a federal district court seeks the same remedy available from the Civil Service Commission and is in effect a review of the action taken by the Commission. Thus, under ordinary circumstances a suit for reinstatement in a federal district court is subject to the requirement that administrative remedies be exhausted by an appeal to the Commission. *Johnson* v. *Nelson*, 180 F. 2d 386 (C.A. D.C.); *Johnson* v. *War Assets Administration, supra.* The Court of Claims, on the other hand, can neither order reinstatement of the employee nor review the action of the Civil Service Commission in that regard. It can only award money damages for loss of back pay resulting from the illegal personnel action. *Keim* v. *United States*, 177 U. S. 290, 295-296; *United States* v. *Jones*, 131. U. S. 1; *Krueger* v. *United States*, 83 C. Cl. 412; *Goodwin* v. *United States*, 76 C. Cl. 218, 233-235.

The jurisdiction of the Court of Claims, therefore, is complementary to that of the Civil Service Commission and is in no sense a procedure of judicial review for Commission action.[11] Under these circumstances, there may be a

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[10] Some cases have relied on the provision of Section 14 of the Veterans Preference Act making corrective action recommended by the Commission "mandatory" on the agency involved as to in effect give the Commission authority to reward back pay. *Smith* v. *United States*, 127 C. Cl. 706, 119 F. Supp. 200; *Goodwin* v. *United States*, 127 C. Cl. 417, 118 F. Supp. 369; see *Hardy* v. *Rossell, supra* at p. 264. Whatever may be the validity of this view under section 14, it is inapplicable to section 12 which contains no comparable provision.

[11] Where administrative remedies must first be pursued, the statute of limitations on a judicial proceeding commences to run only upon completion of the administrative procedures. It is only then that the cause of action arises since the exhaustion of administrative remedies doctrine is concerned with the timing of judicial review of administrative action. *United States* v. *Wurts*, 303 U.S. 414; *Arlington Trust Co.* v. *United States*, 124 C. Cl. 309, 312, 109 F. Supp. 722, 724. In this context, the Court of Claims has recognized that an action for back pay lost as a result of an unlawful discharge or demotion does not involve a review of Civil Service Commission proceedings by ruling that the cause of action arises

question of whether the court or agency has primary jurisdiction, but exhaustion of administrative remedies is not involved. This distinction is well put in Davis, Administrative Law, p. 664, as follows:

> "The doctrine of primary jurisdiction, or preliminary resort, or prior resort, or exclusive administrative jurisdiction, is sometimes confused with, but is clearly distinguishable from the doctrines of exhaustion and ripeness. Those doctrines determine at what stage a party may secure review of administrative action. Primary jurisdiction is a principle which determines whether the court or the agency should make the initial decision. Questions of exhaustion and ripeness may arise whenever judicial review of administrative action is available. Questions of primary jurisdiction arise only when the statutory arrangements are such that administrative and judicial jurisdiction are concurrent for the initial decision of some questions."

See, also, *Id.* at p. 614.

A situation very similar to this case was involved in *Parker* v. *Lester*, 227 F. 2d 708 (C.A. 9). Certain maritime employees were excluded from employment upon merchant vessels pursuant to Coast Guard regulations. These regulations provided certain appeal procedures that had not been exhausted by the employees. Nevertheless, the court held that it had jurisdiction of an action brought by the employees to enjoin enforcement of the regulations. The court held that it was not necessary to exhaust the administrative remedy, since (227 F. 2d, at p. 713):

> "When the nature of plaintiffs' action is considered,

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and the statute of limitations commences to run when the discharge or demotion takes place. *Cuiffo* v. *United States*, 131 C. Cl. 60, 66-67, 137 F. Supp. 944, 947; *Gray* v. *United States*, 124 C. Cl. 313.

it is apparent that no rule relating to prior exhaustion of administrative remedies can deprive the court of authority to pass upon the issues here present. The doctrine of exhaustion of administrative remedies has application in certain types of cases, all of which are substantially different than that presented here. Where an action is brought to obtain a review of an administrative order . . . and the remedy before the agency has not been concluded, of course the right to review has not arisen. The case is not 'ripe for review.' Cf. Federal Power Comm'n v. Metropolitan Edison Co., 304 U.S. 375, 58 S. Ct. 963, 82 L. Ed. 1408. And where in connection with such an administrative proceeding Congress has provided that the remedy before the administrative body is exclusive and has created means for review or enforcement of the board's order in a court, the inference is unavoidable that the statutory procedure is exclusive and that trial of issues in the authorized manner cannot be short-circuited through an independent action for injunction in the district court. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S. Ct. 459, 82 L. Ed. 638.

"Manifestly this is not such a case. The proceeding in the lower court was in no sense a proceeding designed to review administrative action. It cannot be, for the Magnuson Act, the executive order and the regulations contemplate no such review."

The Veterans Preference Act does not provide for or contemplate review of Civil Service Commission action in the Court of Claims. And, the Court of Claims correctly admitted in its opinion in this case that the appeal procedure to the Civil Service Commission is not "mandatory" or exclusive. (Appendix, p. 24.) We submit, therefore, that

there is a conflict of principle between the decision below and *Parker* v. *Lester*. There is a similar conflict in principle between the decision of the Court of Claims and the holding of this Court in *U. S. Alkali Ass'n.* v. *United States*, 325 U. S. 196, 210. That case rejected a contention that the administrative remedy, investigation and recommendation by the Federal Trade Commission, should be exhausted before bringing suit in the federal district court, because of the difference in remedies and the absence of any indication that the administrative remedy was intended to be exclusive. See, also, *United States* v. *Borden Co.*, 308 U. S. 188.

It is true that although the remedies afforded by the Court of Claims and the Civil Service Commission are distinct the facts upon which each of those remedies are predicated may be identical. That is, orders by the Court of Claims awarding an employee back pay and by the Commission reinstating the employee in his old job may depend upon the same factual issues. Where the courts and an administrative agency have concurrent jurisdiction over proceedings that involve the same factual issues, the doctrine of primary jurisdiction is sometimes applied to require that the issues be heard first by the administrative agency. The reasons for this doctrine are to secure the advantages of administrative expertise in resolving complex factual issues and assure uniformity of result. See, e.g., *Far East Conference* v. *United States*, 342 U. S. 570; *Order of Conductors* v. *Pitney*, 326 U. S. 561, 566-567; *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

The reasons for the doctrine give rise to its exceptions. These recognize that there is no need for prior resort to the administrative agency on matters in which the courts are as expert as the agency. This is true when only issues

of law are involved. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 291. And it is true when any issues of fact have already been determined, *Crancer* v. *Lowden*, 315 U. S. 631, 635, or are of a simple, non-technical nature, *Pennsylvania R. Co.* v. *Kittanning Co.*, 253 U. S. 319; *Pennsylvania R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121, 131. We have already shown that there were no relevant controverted issues of fact in these cases. The only issue of any consequence was whether petitioners should be denied recovery for failure to exhaust an administrative remedy; a question of law which could not even be raised before the Civil Service Commission. Thus, the primary jurisdiction doctrine is also inapplicable here.

The exact scope of the doctrine of exhaustion of administrative remedies and its exceptions is obviously a matter of importance in this era of widespread governmental regulation. Whether resort to administrative procedures is necessary when a clear deprivation of a statutory right has occurred is an issue that may arise under many federal statutes other than the Veterans Preference Act. The distinction between the doctrine of exhaustion of administrative remedies and the primary jurisdiction doctrine may also be of great practical importance in many areas of the law. Finally, the precise relationship between the diverse remedies available to federal employees before the Civil Service Commission and the Court of Claims should be finally settled by this Court in view of the frequency with which the issue may arise. Even assuming that the Court of Claims correctly held that petitioners could appeal to the Civil Service Commission, therefore, this Court should

grant certiorari to resolve the conflict of decisions on these important questions of federal law.

Respectfully submitted,

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APPENDIX

OPINION

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiffs in the above styled cases were supervisory employees at the New York Naval Shipyard, Brooklyn, New York. Upon the termination of World War II, quite a number of employees of the shipyard were discharged, which resulted in an excess number of supervisory employees, necessitating a reduction in the force of these supervisory employees. Plaintiffs were demoted incident to this reduction in force. They were veterans and were, therefore, preference eligibles.

The Commissioner of this court reports that as to 15 of these plaintiffs it has been stipulated that "at least one competing non-veteran with lower retention rights was retained by the Navy Department in each plaintiff's grade." The Commissioner also reports that it has been stipulated that as to these 15 they "did not appeal their demotions to the Civil Service Commission." The names of these employees are as follows:

John R. Baker.	Joseph Petrotta.
William J. Bradshaw.	Clyde H. Pettit.
William L. Campbell.	Dickson Watson.
Fred W. Gruber.	Ernest E. Rosenstrom.
Charles E. Kircher.	Charles Simonson.
Edward I. Kwitchoff.	Otto Ubell.
Alexander F. Manfredi.	John F. Schneider.
Sidney J. Smith.	

In addition to these employees, the following plaintiffs took no appeal to the Commission on the ground that their preference rights had been violated, except one, Michael Gelfat, and he withdrew his appeal before final action by the Commission. The names of these plaintiffs are as follows:

John A. Adler.	Henry Horr.
Michael Gelfat.	Alfred M. Johnson.
Robert E. Himwich.	Frank Rom.
Isaac Sussman.	

Defendant defends on the ground that the named plaintiffs did not exhaust their administrative remedies.

In the great majority of cases where plaintiffs have failed to exhaust their administrative remedies the courts have held that their suits are at least premature; that an action in court will not lie until after the administrative remedies have been exhausted. This is the general rule, but there are exceptions to it.

Perhaps the best guide for the application of the rule is that stated in *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, in which the Court said:

> • • • Whether it [the court] should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion. We cannot say that, in denying the motion to dismiss, the discretion was abused.

In other words, there is no absolute requirement that a party exhaust his administrative remedies before coming into court. The court may entertain his suit before he has done so, if in its discretion it thinks the circumstances make it appropriate to do so. We are, of course, speaking of a case where the statute itself does not make the exhaustion of administrative remedies a prerequisite to suit. The statute in question here (58 Stat. 390; 61 Stat. 723; 5 U.S.C. Supp. V, 863) does not make an appeal to the Civil Service Commission a prerequisite to the bringing of a suit by a discharged or demoted employee. The statute provides that the employee "shall have the right to appeal" to the Civil Service Commission. The applicable Civil Service Commission regulation provides that such an employee "may appeal," etc. Neither the statute nor the regulation says that he *shall* do so.

But, notwithstanding the fact that the appeal is not mandatory, we think that an employee must appeal to the Civil Service Commission for an adjustment of his grievances before resorting to the courts, except in unusual circumstances. We think so because the Civil Service Commission was the agency set up by Congress for the express purpose of hearing the grievances of employees. Congress

conferred on the Commission jurisdiction to hear these grievances; it did not confer this jurisdiction on the courts, except where the Commission had acted unlawfully. So, it is to the Commission that an employee must resort, in the first instance; and until that Commission has finally passed on the case, the courts should not take jurisdiction, and then only where the Commission has misapplied the statute under which the employee claims, or in some other way has deprived the employee of the rights to which the law entitles him.

This is the general rule, but it is not without its exceptions. In *John Cuiffo* v. *United States*, 131 C. Cls. 60, we dealt with a case to which we thought the general rule did not apply. We did not think it applied because the Chief of the Civilian Personnel Branch of the Personnel and Administrative Division of the Port of Embarkation, which had issued the order separating the employee from the service, advised him that he might appeal to the United States Civil Service Commission, but that if he did, he could not obtain within the Department of the Army a review of the action separating him from the service, and that if he did elect to secure a redress of his grievances through the procedure of the Department of the Army, he would in all probability lose his right to appeal to the Civil Service Commission, since appeals to the Civil Service Commission had to be taken within 10 days from the effective date of the order of separation. Plaintiff elected to secure redress of his grievances through Army channels, and after he had failed to secure redress there, he did not appeal to the Civil Service Commission, apparently believing that he could not do so since the time for the appeal had elapsed and because of the advice of his superiors in the Army that if he did undertake to secure redress through Army procedure, this might preclude him from appealing to the Civil Service Commission.

Under those facts, we thought that plaintiff was to be excused for not having appealed to the Civil Service Commission and could come to this Court, notwithstanding his failure to appeal.

The ordinary rule, however, is that stated in *Martilla* v.

United States, 118 C. Cls. 177, in which we held that as a general rule an employee cannot come into court until after he has appealed to the Civil Service Commission, and that commission has finally acted on his case.

In the cases at bar, we see no excuse for the failure of plaintiffs to appeal to the Civil Service Commission. They say their superiors advised them not to do so because it would do them no good, and because they feared that if they did, their superiors would deprive them of overtime, give them unpleasant jobs, etc.; but the Commissioner has found, and we agree with his finding, that this fear was not the result of any reliably proven threats by plaintiffs' superiors, nor supported by instances of reprisals against employees who did appeal.

Moreover, an appeal to the Civil Service Commission would no more have resulted in reprisals against the employees than would a suit in court. The cases simply boil down to this: the plaintiffs selected the wrong forum for redress of their grievances. They should have gone first to the Civil Service Commission. They had no right to come here until after they had done so.

It results that the petitions of plaintiffs John R. Baker, William J. Bradshaw, William L. Campbell, Fred W. Gruber, Charles E. Kircher, Edward I. Kwitchoff, Alexander F. Manfredi, Clyde H. Pettit, Dickson Watson, Ernest E. Rosenstrom, Charles Simonson, Otto Ubell, John F. Schneider, Sidney J. Smith, Joseph Petrotta, John A. Adler, Michael Gelfat, Robert E. Himwich, Henry Horr, Alfred M. Johnson, Frank Rom, and Isaac Sussman must be dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

FINDINGS OF FACT

The court, having considered the evidence, the report of Commissioner C. Murray Bernhardt, and the briefs and argument of counsel, makes findings of fact as follows:

1. These four cases have been joined because of similarity

of issues. To avoid undue repetition and at the same time provide the factual details from which certain major conclusions are drawn, the introductory findings 2 through 17 are a general recapitulation and appraisal of the evidence pertaining to all plaintiffs, while findings 18 through 110 are special findings applicable to each individual plaintiff.

2. Each plaintiff was, at the time of his demotion, a civilian employee of the New York Naval Shipyard, Brooklyn, New York (hereinafter "Shipyard"), occupying a supervisory position. Each plaintiff is a preference eligible as defined by the Veterans Preference Act of 1944, as amended. Each plaintiff at the time of his demotion held an efficiency rating of "good" or better.[1]

3. For functional purposes, the New York Naval Shipyard is divided into 18 or 20 different shops. The journeymen skilled in a particular trade or one allied thereto are assigned to one of several shops charged with carrying out assignments peculiar to that trade. The lowest grade supervisor in each shop is called a leadingman. Each leadingman supervises from 15 to 30 journeymen. The next step is the quarterman, who supervises two or three leadingmen. The larger shops have a chief quarterman and then a foreman for each shift. In charge of each shop is a master who is responsible for final decisions in the shop. Each shop also has a personnel supervisor.

4. Plaintiffs' demotions in grade and salary took place for the most part during the latter half of 1947 and early in 1948.[2] Postwar reductions in the force of employees in nonsupervisory positions (journeymen) had resulted in an excess number of supervisors, making it necessary to demote plaintiffs who held supervisory positions. Each plaintiff supervisor had previously been demoted either in 1946

[1] Except plaintiffs Schneider, Smith and Petrotta, as to whom the record contains no evidence of efficiency ratings.

[2] The causes of action by plaintiffs Adler, Gelfat, Himwich, Johnson, and Sussman (all reported herewith in findings 18 through 23, 34 through 41, 44 through 49, 57 through 62, and 92 through 96, respectively) occurred later and involve issues which differ substantially from those involved in the cases of the other plaintiffs. Thus the introductory findings 2 through 16 apply to the five above plaintiffs only to the extent that they are descriptive of general conditions prevailing at the Shipyard.

or 1947, and had been restored without making an appeal to the Civil Service Commission. The restorations by the Navy Department in those earlier instances occurred as a result of a ruling by the Commission in another contemporary case that the demotion of a comparable shipyard supervisor, demoted under similar circumstances, was procedurally improper.

5. The parties have stipulated with reference to the plaintiffs listed below that (1) each was demoted from his supervisory position as indicated to the next lower position as a result of a reduction in force of lower level employees resulting in a surplus of supervisors; (2) at least one competing nonveteran with lower retention rights was retained by the Navy Department in each plaintiff's grade, and (3) plaintiffs did not appeal their demotions to the Civil Service Commission:

Name	*Date of demotion*	*Demoted from*
John R. Baker	1/12/48	Quarterman Machinist
William J. Bradshaw	1/12/48	Leadingman Machinist
William L. Campbell	1/12/48	Leadingman Boilermaker
Fred W. Gruber	1/12/48	Leadingman Machinist
Charles E. Kircher	5/17/48	Leadingman Machinist
Edward I. Kwitchoff	5/17/48	Leadingman Machinist
Alexander F. Manfredi	7/28/47	Quarterman Painter
Clyde H. Pettit	1/12/48	Quarterman Machinist
Dickson Watson	7/28/47	Leadingman Boatbuilder
Ernest E. Rosenstrom	1/12/48	Leadingman Machinist
Charles Simonson	7/28/47	Quarterman Machinist
Otto Ubell	7/28/47	Quarterman Machinist
John F. Schneider	1/12/48	Quarterman Coppersmith
Sidney J. Smith	5/17/48	Leadingman Machinist
Joseph Petrotta	5/3/48	Leadingman Welder

6. During the period following World War II, when the Shipyard was undergoing large reductions in force resulting in reductions in grades among the supervisors, a feeling of resentment developed on the part of the nonveteran employees against the preference eligibles primarily as a result of employment retention preferences guaranteed by the Veterans Preference Act of 1944, as amended. The nonveterans formed an organization called the "Career Workers Association" to discuss job protection rights of non-

veterans and attempted to resist the preferences guaranteed to veterans by the Veterans Preference Act. The members of the Association wore badges bearing the words "Second Class Citizens" as a public display of their feelings about the Veterans Preference Act. The existence of this condition created an air of tension throughout the Shipyard.

7. Most of the top level supervisory force (masters, foremen, and chief quartermen) were nonveterans. These top level supervisors were concerned over the effects of the Veterans Preference Act, believing that in some ways it created injustices among the personnel and would interfere with production in the Shipyard. The morale and feeling of security of those employes entitled to veterans preference suffered considerably as a result.

8. A few veterans who had been demoted in circumstances similar to those surrounding the demotions of the plaintiffs reported herein filed appeals.[3] While there was some evidence that reprisals may have been inflicted upon those who had the temerity to appeal their demotions—reprisals in the form of assignments to onerous or unpleasant details, loss of overtime, frequent transfers to various jobs, transfers to assignments remote from one's home so as to complicate daily commuting, and the like—the evidence offered was too speculative for reliance and the hardships inflicted may have been due to other undisclosed causes. The top level supervisors such as the master, foremen, and chief quartermen, undoubtedly had the collective authority and power to make working conditions unpleasant for their subordinates, but the evidence of their exercising this power to coerce the plaintiffs into not appealing their demotions was not reliably shown. The details of the alleged threats are set forth more specifically in the later findings dealing with the individual plaintiffs.

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[3] Defendant was unable, without exhaustive research, to provide complete statistics as to the total number of those demoted at the Shipyard who appealed. It is known that at least 128 civilians in supervisory positions were demoted, of whom 23 appealed, but it is not believed this record is at all complete, nor is it known if it is even representative. The complete statistics might have had a direct bearing on the extent to which the fear of the consequences of appeal expressed by most plaintiffs herein operated as a deterrent to appeal in the Shipyard as a whole.

9. The Civil Service Commission denied the appeals taken in 1947 and 1948 by those of the supervisors who then appealed their demotions (not the plaintiffs herein). However, following the decision of the Circuit Court of Appeals in *Reynolds* v. *Lovett*, 201 F. 2d 181, certiorari denied *sub nomine Wilson* v. *Reynolds*, 345 U. S. 926, the Commission in 1953 amended its regulations to conform to the court's holding, reopened and reconsidered previous appeals and ordered those veterans who had appealed to be restored to their former positions in the Shipyard.

10. Plaintiffs are skilled and experienced in their respective trades. Their formal education was limited, for the most part, to grammar school. The job comparisons which resulted in their demotions were accomplished by their respective masters, whose power to promote and reduce personnel, while not unlimited, was very broad, requiring only confirmation by their Shipyard superiors. Their authority was supreme in this respect at the shop level and, in the eyes of subordinates, the master was virtually omnipotent.

11. Each plaintiff was advised in writing at the time of his demotion of his right to appeal to the Civil Service Commission.

12. Most of the plaintiffs discussed the question of appealing with their superiors (masters, foremen, chief quartermen, or quartermen) who advised against such action, stressing the futility of it and, in some cases, holding out to plaintiffs a prospect of restoration in the near future. Since within the preceding year plaintiffs had been restored after temporary demotions without taking formal appeals, it is reasonable to conclude that the prospect of restoration had a profound effect on their decisions not to appeal.

13. Plaintiffs chose not to appeal to the Civil Service Commission for the reasons stated above and because they were afraid that such action on their part would jeopardize their right to continue as employees at the Shipyard. Several were to reach the age for retirement within a few years. Others had large families to support. Some were afraid that taking an appeal would result in curtailment of their normal overtime allotment, or even in complete loss of all

overtime. The fear of reprisal was also constantly with plaintiffs and further motivated their decisions not to appeal. These assorted fears, while genuine to those plaintiffs entertaining them, were not supported by the evidence to be proximately consequential to any reliably proven threats by superiors or instances of reprisals against other nonconforming employees in the Shipyard. The economic situations of the plaintiffs, their dearth of comprehension of their rights, their awe of authority, all contributed in varying degrees to a paralysis of their capacity for self-assertion.

14. On July 22, 1953, following the decision in the case of *Reynolds* v. *Lovett, supra,* most of the plaintiffs,[4] acting through their attorney, wrote to the Director, Second U. S. Civil Service Region, requesting a review of their demotions and directing the Commissioner's attention to the Court of Appeals decision in *Reynolds* v. *Lovett, supra.*

15. By letter of August 17, 1953, the Regional Director of the Second Region replied advising that effective July 28, 1953, the Commission's regulations governing appeals of preference eligibles under the Veterans Preference Act of 1944 was amended to entertain further appeals only under certain circumstances (5 CFR 22, 11 (e)(2), 18 F. R. 4395). The Regional Director interpreted this amendment as follows:

> Under the revised regulations, the Commission will consider further appeals where there is a record of a previous timely Section 14 appeal of such demotion to the Commission, except that an appeal which was previously declined under the provisions of Section 14 and the Commission's regulations in Section 22.4 on the ground of delay in submission will not be reopened. Further, where there is no record of a previous timely appeal and *it is not established by the evidence* that there was an attempt to make such appeal within the time limits of the law and Section 22.4 of the Commis-

[4] Excepting plaintiffs Schneider, Smith and Petrotta who are not referred to in the cited communication. Petrotta requested a review of his demotion on November 24, 1953.

sion's regulations pursuant thereto, the request for consideration will be declined since it is not a case of reopening an appeal.

16. In response to the Second Region's letter of August 17, 1953, plaintiffs, by letter dated November 24, 1953, transmitted representative affidavits outlining the circumstances which prevented their pursuing administrative appeals in 1947 and 1948. In concluding their request for review, plaintiffs said:

> As a result of the far-reaching and extensive reduction in force programs, conditions in the New York Naval Shipyard were very unsettled during the year 1947, and the employees of the Shipyard were more concerned with continuing as employees than retaining any particular rank. Threats of complete discharge rang through the ranks and the fear of reprisals was acute. Scuttlebutt was fed by certain of the higher supervisory echelons that appeals were useless and retaliatory action was almost certain to be taken. There was, therefore, no uniform appeal. The affidavits attached hereto indicate the reasons why, in 1947 and 1948, these and other employees felt it inadvisable to appeal to your office. Conditions have now changed. Therefore, in view of your discretionary authority under Section 22.4 of Chapter Z-1 of the Federal Personnel Manual, each appellant requests that you now review his demotion and examine the registers which were improperly compiled at the time of the adverse agency action.

17. The Second Region advised plaintiffs by letter dated December 2, 1953, that the requests and affidavits transmitted by letter of November 24, 1953, were being forwarded to the Commission's Board of Appeals and Review for further consideration. By letter of July 16, 1954, the Board of Appeals and Review decided that no basis was found in the additional material presented by plaintiffs for holding that their failure to file timely appeals was due to circumstances beyond their control. In so holding, the Board said:

According to the information submitted by or in behalf of the 23 listed employees, various attempts were made by some of them to appeal their demotions within the employing agency, although apparently all were aware of their right to appeal to the Civil Service Commission. It is further indicated that they refrained from pursuing this right because of alleged fear of future reprisal in connection with their employment. Irrespective of the particular Regulation under which these cases have been considered, alleged fear of reprisal is not regarded as a condition which necessarily prevents the filing of a timely appeal. In the instant cases the employees made their own decision not to exercise their appeal rights, and the only occasion for their present request is their having learned of a Court decision issued many months, and in some of the cases years, after their original abandonment of their appeal rights.

JOHN A. ADLER

(Plaintiff No. 1 in Adler petition)

18. Plaintiff John A. Adler, a preference eligible, was employed at the Shipyard at time of trial as a fourth class machinist. He was first employed by the Shipyard as a machinist in 1920, reduced in force in 1923, and returned in 1934 as a machinist.

19. In 1943 he was made a machinist instructor and held this position on permanent status until December 10, 1945, when he was reduced to machinist first class. Effective November 5, 1951, Adler once again was made machinist instructor, an additional pay assignment ($16.24 per day), from machinist third step ($15.76 per day). He served in the grade of machinist instructor third step until June 16, 1952, when he became eligible for advancement to the fourth step. Since the Shipyard system of gradation at that time made no provision for a fourth step pay increase for the grade of machinist instructor, Adler was reassigned as machinist fourth step, effective June 16, 1952, in order to gain advantage of the administrative pay increase of 64 cents per day.

20. However, effective July 10, 1952, machinist instructors were given a 15 cents per hour pay increase by order of the Commander, New York Naval Shipyard. Adler's grade designation was once again changed, effective July 21, 1952, to machinist instructor to give him the benefit of the pay increase to $18.08 per day.

21. On August 6, 1952, Adler was notified that, effective August 11, 1952, his additional pay assignment as machinist instructor, at $18.08 per day, would be terminated and he would be reassigned as machinist fourth step, at $16.88 per day. Section 5 of Navy Civilian Personnel Instructions, dated July 27, 1951, reflecting an agreement between the Navy Department and the Civil Service Commission, provided that the Veterans Preference Act would not apply to assignments of under 121 calendar days to a series of enumerated employments, among which was that of instructor. The evidence does not disclose the authority for the instruction in question, or for the Navy's agreement with the Civil Service Commission.

22. At the time he received the notification of his reduction to machinist fourth step, in August 1952, Adler was told by his quarterman that all the instructors were being reduced and it would do no good to appeal. Thereupon Adler chose not to appeal his demotion to the Civil Service Commission, and did not do so.

23. On July 19, 1954, the Board of Appeals and Review of the Civil Service Commission denied Adler's request of November 24, 1953, for a review of his reduction of August 1952. The grounds of the denial were that Adler had failed to file a timely appeal.

JOHN R. BAKER

(Plaintiff No. 3 in Adler petition)

24. Plaintiff John R. Baker, a preference eligible, retired on December 31, 1954, after 40 years as a machinist in the Shipyard. He had a grammar school education and served seven years as a quarterman machinist prior to demotion to leadingman machinist on January 12, 1948.

25. A few days after his demotion in 1948 Baker discussed

the possibility of taking an appeal with his then immediate supervisor, quarterman Charles Testut, a nonveteran. Testut told Baker: "I don't know whether you will have anything to be gained by going down and appealing your case."

26. At about the same time Baker's personnel supervisor, a nonveteran, asked Baker to relinquish his rating as quarterman and become a journeyman where he would have no supervisory functions, since to remain as a supervisor would be detrimental to his health.

27. Some veterans in Bakers shop who appealed their demotions were thereafter shipped from job to job, some of the assignments being of an undesirable nature, but the evidence is not adequate to establish these as reprisal measures taken by the shop superiors. At the time of his demotion Baker lacked five years' service of qualifying for full retirement annuity.

28. Baker's election not to appeal his demotion was voluntary, motivated by self-persuaded fear of losing his job and risking his chances for full retirement, advice from his superiors, and the potential detriment to his health if he were given work assignments of an undesirable nature.

William J. Bradshaw

(Plaintiff No. 5 in Adler petition)

29. Plaintiff William J. Bradshaw is a preference eligible and had served 13 years in the Shipyard prior to demotion to machinist from leadingman machinist on January 12, 1948.

30. At the time of his demotion he had the impression that Shipyard officials did not wish demoted veterans to appeal and that it would be better for all concerned and "for the good of the service" if he accepted his demotion without protest. He testified that a feeling prevailed among veterans that taking an appeal was "like hitting your head against a stone wall." Because of the existing conditions, Bradshaw did not choose to take what then appeared to him to be the foolish risk of appealing and perhaps thereby prejudicing his opportunity for future promotion.

William L. Campbell

(Plaintiff No. 6 in Adler petition)

31. Plaintiff William L. Campbell, a preference eligible, had been an employee in the Shipyard for 19 years as plumber and boilermaker. He had an eighth grade education and, at the time of his demotion on January 12, 1948, from leadingman boilermaker to boilermaker, he was approaching retirement.

32. Campbell testified that, at the time of his demotion, the master of his shop asked him to sign a waiver of his right to appeal (which he did not sign), but the evidence does not substantiate this to be the fact.[5] At the same time the master told Campbell that he would try to get Campbell's supervisory job restored to him later when things settled down, and that he did not think it would do much good to appeal. Campbell was also informed by the master that those who appealed would "have a hard job on their hands" which, rightly or wrongly, Campbell interpreted to mean that those who appealed would be given unpleasant work assignments in reprisal.

33. Campbell's election not to appeal his demotion in 1948 was voluntary, motivated by self-instilled fear of jeopardizing his job or being given undesirable work assignments, faulty but not vindictive advice from his master, and personal belief that he would be restored to his former position when conditions permitted.

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[5] Campbell and a few other witnesses for plaintiffs testified that they or other veteran demotees had been presented with such waiver forms to sign. However, no such waiver forms were in evidence, no apparent effort was made to produce samples of them through discovery procedures (the Sussman affidavit in finding 95 is inapposite), several of plaintiff's witnesses denied having seen or heard of the forms, and defendant's witnesses denied the existence or use of them. It is a speculative conclusion that those witnesses who were given forms to sign erroneously recalled them to have been waiver forms, whereas more likely they would have been receipts acknowledging service of demotion notices. Most of the plaintiffs, skilled though they may have been in the proficiencies of their trades, were not trained in the intricacies of office procedures.

Michael Gelfat

(Plaintiff No. 15 in Adler petition)

34. Plaintiff Michael Gelfat, a preference eligible, was employed at the Shipyard at time of trial as Engineering Aid, CAF-5. He was first employed by the Shipyard in January 1942, as a junior storekeeper, and in 1943 was promoted to assistant storekeeper.

35. After a tour of military duty, he returned to the Shipyard in 1946 as traffic clerk. In this capacity he had complete charge of receiving at the South Brooklyn Annex, a subdivision of the supply department of the Shipyard, and directly supervised 11 storekeepers, 3 clerks, and 32 checkers. He was responsible for checking the property receiving activities on two piers and a few warehouses, as well as being responsible for assignment of checkers and preparation of their efficiency ratings. He remained as supervisor at the South Brooklyn Annex for approximately nine months until the Annex was closed in 1946 under a decommissioning program.

36. He was transferred back to the Shipyard in 1946 in his same grade but was assigned the duties of a checker picking up materials with no supervisory authority whatsoever. Later he was assigned to receive materials in the receiving office but still without any supervisory functions.

37. In 1949 Gelfat was requested to write a position description of the duties he was performing at that time. He was notified on August 8, 1949, of the proposed action to change the allocation of his position from Traffic Clerk, CAF-5, $3,351 per annum, to Storekeeper (Receiving), CAF-4, $3,175.44 per annum, as the result of a classification survey of the supply department. The notice informed him of his right under the Veterans Preference Act of 1944 to answer and to request a formal hearing, and advised that the reduction was to promote the efficiency of the service and did not involve a reduction in force. He failed to reply orally, or in writing, and did not request a formal hearing. He was notified on September 6, 1949, of the adverse decision, and advised of his right to appeal to the United

States Civil Service Commission. The proposed action was made effective September 18, 1949.

38. By letter of September 8, 1949, Gelfat appealed the downward allocation of his position to the Second Civil Service Region. Effective September 18, 1949, he was reduced from Traffic Clerk, GS-5 to Storekeeper, GS-4. This was the first time the change in his supervisory functions as a result of his transfer from the South Brooklyn Annex resulted in any decrease in pay.

39. A few days after the filing of his appeal, Gelfat was interviewed by an investigator from the Civil Service Commission. The purpose of the interview was to obtain an affidavit from Gelfat stating the facts upon which the appeal was based. Such interviews were standard operating procedure. Following the interview Gelfat signed the following affidavit, composed by the investigator, withdrawing his appeal:

> I desire to withdraw the appeal which I filed with the U. S. Civil Service Commission protesting the allocation of my position from Traffic Clerk, CAF-5 to Storekeeper CAF-4. I filed said appeal under the provisions of Section 14 of the Veterans Preference Act of 1944.
>
> I understand my rights under Section 14 of the Veterans Preference Act of 1944 and I am making this statement of my own free will without threat, coercion or promise of reward.
>
> I have read the foregoing statement consisting of two (2) pages, fully understand same and find it to be true and complete to the best of my knowledge and belief.

40. Although Gelfat testified that the investigator had misrepresented the nature of the foregoing affidavit (which Gelfat apparently signed without reading) to be merely a certificate that he had been interviewed and understood his rights, and that the investigator had represented to him that it was management's prerogative to assign him to any job and that it would be hopeless to continue his appeal, the evidence does not establish that the affidavit was induced through coercion or misrepresentation or that it was not a

free and voluntary act. Nor does the evidence disclose the precise reason for execution of the affidavit by Gelfat.[6]

41. On September 23, 1949, the Commission advised Gelfat in writing that no further action would be taken on his appeal in view of the affidavit withdrawing it. The evidence contains no reply or protests by Gelfat and no record of any subsequent attempts by him to ascertain the status of his appeal.

FRED W. GRUBER

(Plaintiff No. 16 in Adler petition)

42. Plaintiff Fred W. Gruber, a preference eligible, retired on June 30, 1952, after having completed 25 years of service as a machinist in the Shipyard. His formal education consisted of grammar school plus some night school work at the high school level. On January 12, 1948, he was demoted from leadingman machinist to machinist.

43. When he received his notice of demotion he did not appeal and did not discuss the question of appealing with his superiors because he was afraid of retaliations and did not want to jeopardize his retirement prospects. His fear was not based upon anything told him by his superiors, but upon his personal feelings as to the unpopularity of the veterans in the Shipyard during the reduction program, his claimed knowledge of two other demoted supervisors who had been shifted around from job to job and given unpleasant assignments after they had appealed, and his belief that his superiors kept for purposes of harassment a record of those employees who exhibited undue independence. When asked at trial as to whether it was not normal procedure for Shipyard employees to be given frequent changes of assignment not as a reprisal measure, Gruber's following response reveals an attitude of mind which typified many employees similarly situated:

> They can do a lot of things to you down there and tell you it was the normal thing to do. That is what they

[6] Gelfat impressed the trial commissioner as an alert and intelligent person, well able to read and to comprehend the effect of the affidavit which he signed.

will do; they will take me and push me some place, and they will say, "Well, Gruber has been a good man all these years; he has worked in such and such work," and now they will say they don't like me for some reason and they are going to push me out of this job here, and I will say to them—well, what can I say? I go before the Board and say something, and they say, "Well, we needed a man on this job and you were the logical man to do it", and then what can I say? Sure, I was, but ordinarily I wouldn't be assigned to that kind of a job.

ROBERT E. HIMWICH

(Plaintiff No. 19 in Adler petition)

44. Plaintiff Robert E. Himwich, a preference eligible, was employed at the Shipyard at time of trial as Traffic Clerk, GS-4. He had been an employee in the Shipyard since 1941, beginning there in the grade of Junior Storekeeper, GS-2, and advancing to the grade of Traffic Clerk, CAF-6, in December 1944.

45. In the position of Traffic Clerk, CAF-6, Himwich had direct supervision over more than 20 laborers and about seven classified employees. He was in charge of the car and lighterage section in an assignment comparable to that of a traffic agent in the field of commercial transportation.

46. In 1947 the Shipyard began to gradually curtail Himwich's supervisory activities due to a general reorganization made necessary by a reduction of workload at the Shipyard. Laborers who had previously been under his supervision were reduced in force or assigned elsewhere. His duties were transferred to other departments, his office torn down, and his original department consolidated with another section. This reduction in duties and supervisory functions continued until, in 1949, Himwich was charged with the supervision of only two or three checkers drawn from a labor pool as needed.

47. Early in 1949, Himwich was requested to and did prepare a position description of the duties he was performing at that time. Based upon this description his position was reevaluated and allocated as Traffic Clerk, CAF-4. The

determination of grade by the position classifier was based in large measure upon the degree of supervision which Himwich exercised.

48. On August 8, 1949, Himwich was notified of his proposed demotion from grade CAF-6 to CAF-4, effective not less than 30 days thence, as a result of a classification survey made in the supply department. On September 18, 1949, he was reduced to CAF-4. This was the first date on which the decrease in his supervisory functions and substantial change in his duties resulted in any decrease in pay. At no time prior to August 8, 1949, was Himwich advised either orally or in writting of any proposal to remove subordinates from his supervision or to substantially change his duties.

49. He appealed his change to a lower grade to the Second Regional Office of the United States Civil Service Commission and, in an affidavit submitted in support of his appeal, he stated in part:

> I am appealing the aforementioned downgrading action under the provision of Section 14 of the Veterans' Preference Act of 1944. I feel that said action was unfair and highly unjust. It is my contention that my position has been improperly allocated at the CAF-4 level. I contend that the duties and responsibilities of my position are such that the job should be properly classified and allocated at grade CAF-6 or at least a minimum of Grade, CAF-5.
>
> I have read position description No. S-32159, and find that said description reflects the duties and responsibilities of my position. However, I feel that sufficient weight has not been given to the responsibilities of my position to the value of my knowledge of various railroad tariffs and regulations.
>
> My duties and responsibilities are the same now as they were prior to the downgrading action.
>
> I feel that a desk audit of my position is necessary in order that full evaluation of the duties and responsibilities of my position can be accomplished.
>
> I have no further information to submit to the Commission in this matter.

> I do not contend that I have been discriminated against in this action, which downgraded me to CAF-4, in any manner whatsoever.

He was given a hearing by the Regional Office and the action of the Shipyard was sustained on October 13, 1944. He appealed to the Commission's Board of Appeals and Review which affirmed the Second Region's descision. There is no evidence that a request for reconsideration was filed with the Commission. His sole contention in the course of the appeal was that his downgrading to Traffic Clerk, CAF-4, resulted from an erroneous classification of his position.

HENRY HORR

(Plaintiff No. 20 in Adler petition)

50. Plaintiff Henry Horr was employed at time of trial in the Power Plant Division of the Public Works Shop at the Shipyard as a leadingman electrician.

51. He began his employment with the Shipyard in 1936 as a third class electrician in the electrical shop. In 1938 he was transferred to the power plant (03 shop) in the capacity of maintenance man and operator of electrical equipment for the power plant. He was promoted to leadingman power plant mechanic in 1942, and in May 1944 he was promoted to quarterman, electric power plant. There were two titles in the power plant, mechanic and electrician. The titles meant little since many of the duties in 1948 were interchangeable, and the difference between the respective functions of the positions was very small.

52. On April 19, 1948, Horr was demoted from quarterman electrician to leadingman electrician in shop 03, power plant, as a result of a reduction in force of lower level employees. He was the only quarterman electrician in the shop. At the time of the demotion a competing nonveteran, John T. Tierney, was retained as a quarterman mechanic in the same shop. Tierney had been a leadingman or quarterman mechanic in shop 03 since 1942. During the period prior to Horr's demotion, the quarterman duties in the power plant were divided between Tierney and Horr, with Tierney per-

forming the inside mechanical and office work, and Horr performing the outside work on the mechanical and electrical distribution systems. Horr has continued to perform the stated mechanic duties and the duties of quarterman electrician since his demotion, although rated leadingman electrician.

53. There were also quartermen electricians in the material laboratory (09 shop) and the electrical shop in April 1948. Because the duties of an electrician attached to the power plant are of a higher standard than those in the other shops, an electrician in the power plant could readily handle the work of one in the electrical shop although the reverse might not be true.

54. Upon receipt of the notice of his demotion and right to appeal, Horr told his master that he was considering taking an appeal, to which the master replied: "You would be foolish, if you did, because I will be still your boss." Horr also was advised by his personnel supervisor not to appeal, and was told that he would be restored to his former grade as soon as Tierney retired.

55. Horr's election not to appeal his demotion was voluntary, motivated by the advice of his superiors, hope that he would be reinstated without appealing, and fear of courting the displeasure of his superiors, the last being based upon his asserted knowledge of instances where the master had harassed employees who had come into his disfavor.

56. There is no evidence in the record (beyond what is reported above) that Horr had retention rights superior to any other employee in any applicable competitive level.

Alfred M. Johnson

(Plaintiff No. 21 in Adler petition)

57. Plaintiff Alfred M. Johnson, a preference eligible, was first employed by the Shipyard in 1940 as a junior storekeeper. From 1943 to 1945 he was in military service and, soon after his return to work in the Shipyard in 1945, he was placed in charge of the night shift in Building 3 with the grade of Traffic Clerk, CAF-5. In this capacity he super-

vised 37 per annum employees, the majority of whom held grade CAF-4.

58. Johnson remained as supervisor in charge of the night shift until 1947 when he was notified verbally to report to the day shift. Upon reporting to the day shift he was detailed to receiving decommissioned materials, accomplishing bills of lading and disposing of the decommissioned material either to War Assets Administration or General Supply.[7] These duties entailed no supervisory responsibility.

59. In February 1949, in the course of a classification survey, Johnson was requested to and did write a position description of the duties he was performing on the day shift at that time. With this position description as a basis, the duties and responsibilities of Johnson's position were analyzed and then evaluated by the Area Wage and Classification Office as allocable to the grade of storekeeper.

60. On August 8, 1949, he was notified in writing of this determination and of the resulting downgrading to become effective not less than 30 days later, and was advised therein of his rights as a veteran, including his right to a hearing. No reply was made to the notification of the proposed change to a lower grade and no request was made for a formal hearing. On September 6, 1949, he was notified that the proposed reduction would be effective on September 18, and was advised of his right to appeal to the Regional Director of the Civil Service Commission. On September 18, 1949, he was demoted from Traffic Clerk, CAF-5 to Storekeeper, CAF-3, with a resulting decrease in pay. This was the first date on which the change in Johnson's duties and supervisory responsibilities had resulted in a change in his pay status.

61. He did not appeal his demotion to the Civil Service Commission. He did, however, discuss the reduction with his immediate supervisor who, when asked about appealing, advised (Johnson's paraphrase): "Well, you would be butting your head against a stone wall. It is management's decision to reduce you." His supervisor further advised

[7] The witness employing this term probably had reference to the Bureau of Federal Supply which, in 1947, was the predecessor to the Federal Supply Service of the General Services Administration (5 U. S. C. 630 a).

Johnson that the demotion was probably temporary and it would be adjusted eventually with Johnson being promoted to grade 4. Johnson was also friendly with plaintiff Gelfat and was informed of Gelfat's discussion with the Civil Service investigation as outlined in findings 34 through 41. As a result of these discussions Johnson chose not to appeal. There is no evidence that he chose not to appeal as a result of undue influence.

62. Subsequent to 1949 Johnson was promoted to the grade of Storekeeper, GS-4, a position which he held at the time of trial.

CHARLES B. KIRCHER

(Plaintiff No. 22 in Adler petition)

63. Plaintiff Charles B. Kircher, a preference eligible, was employed in the Shipyard at the time of trial as a shipbuilding inspector. He had been an employee in the Shipyard since 1940 and served as a leadingman for five years prior to 1948.

64. On November 18, 1946, Kircher was reduced from leadingman machinist to machinist, and was restored to the former on May 5, 1947. On May 17, 1948, he was again reduced to machinist, which action he did not appeal.

65. At about the time of his reduction in 1948 Kircher discussed the question of appeal with his assistant personnel supervisor who advised that chances of success on appeal were "pretty slim" and if no appeal were taken, Kircher would be one of the first to be restored as supervisor. Kircher sought the advice of his quarterman who was his immediate supervisor, who also advised him not to appeal. His superiors did not threaten him with undesirable assignments or pay reductions if he appealed. At the time of his demotion in 1948 Kircher had ten children to support. A definite air of tension between nonveterans and veterans existed in the Shipyard.

66. Kircher's election not to appeal his demotion in 1948 was voluntary, motivated not by coercion or undue influence of his superiors, but by the advice they had given him and the consequent feeling that his restoration was simply a

matter of time (as it had been on the prior occasion) and might be jeopardized by his taking an appeal.

EDWARD I. KWITCHOFF

(Plaintiff No. 23 in Adler petition)

67. Plaintiff Edward I. Kwitchoff, a preference eligible, was employed in the Shipyard at time of trial as a leadingman machinist, having been promoted to this grade on March 17, 1952. He had been employed by the Shipyard since 1936.

68. Prior to his demotion from leadingman machinist to machinist on May 17, 1948, Kwitchoff's duties involved office work and he was in constant close contact with the master of the shop. As a result, he overheard many conversations with and comments by the master in connection with appeals by various unnamed demotees and had an opportunity to observe at first hand the master's attitude toward veterans who indicated they would appeal. The master resented those who filed appeals.

69. A few days after receiving his demotion notice, Kwitchoff, who was quite friendly with the master, sought the latter's advice about appealing his demotion. The master said he would not recommend appealing and that it would be against Kwitchoff's best interests. Kwitchoff also spoke to the assistant personnel supervisor who advised against taking an appeal.

70. As a result of the foregoing advice from both the master and assistant personnel supervisor, and from the many conversations he had overheard, Kwitchoff felt it would be to his disadvantage to appeal his demotion, and so did not.

ALEXANDER F. MANFREDI

(Plaintiff No. 28 in Adler petition)

71. Plaintiff Alexander F. Manfredi, a preference eligible, was employed in the Shipyard at time of trial as a leadingman painter. He had been employed theretofore by the Shipyard for 19 years. He completed grammar school and attended evening high school.

72. On March 17, 1947, Manfredi was demoted from quarterman painter to leadingman painter and restored to the former rank on May 5, 1947, without taking an appeal. On July 28, 1947, he was again demoted to leadingman painter.

73. Although he was aware of his rights, plaintiff did not appeal or discuss the question of appeal with his superiors because he felt that the Shipyard sentiment against veterans was so prevalent, and his master, a nonveteran, was so stubborn and unapproachable a person, he might jeopardize his job or draw unpleasant assignments by appealing. He had not been told by his superiors that he should not take an appeal, but he was personally aware of the fact that his superiors were in a position to discharge or inflict unpleasant assignments upon those who appealed.

Clyde H. Pettit

(Plaintiff No. 30 in Adler petition)

74. Plaintiff Clyde H. Pettit, a preference eligible, was employed in the Shipyard at time of trial as a quarterman machinist, having been promoted to that grade on January 7, 1952. He had a high school education and had 31 years' service in the Shipyard. He had served as a quarterman machinist for four years prior to his demotion to leadingman machinist on January 12, 1948. He did not appeal his demotion.

75. Pettit feared that if he did appeal his demotion he would jeopardize his right to a share of allocable overtime and endanger his employment in the Shipyard. His quarterman and foreman, who controlled and approved overtime for employees, were both nonveterans, and he had the impression that veterans were unpopular with the nonveteran supervisors. Pettit had seen the treatment accorded others who had appealed their demotions and the unpleasant assignments and constant shifting from job to job following their appeals. These impressions of Pettit were generalized and subjective, and not of evidentiary quality. He did not discuss the subject of appeal with his superiors, nor did they threaten him with reprisals if he appealed.

Dickson Watson

(Plaintiff No. 37 in Adler petition)

76. Plaintiff Dickson Watson, a preference eligible, was employed in the Shipyard at time of trial as a boatbuilder. He had spent his life in the boatbuilding trade and had been employed by the Shipyard for over 32 years.

77. On November 18, 1946, Watson was demoted from leadingman boatbuilder to boatbuilder and was restored to the former rank on May 5, 1947, by action of the Shipyard without appeal on his part. On July 28, 1947, he was again demoted to boatbuilder, and filed no appeal to this action, nor did he discuss the subject of appeal with his superiors.

78. The election not to appeal was voluntary on the part of plaintiff, motivated by his fear of prejudicing his chances for future promotion, based not upon any threats of reprisals by his superiors, but upon his impression that veterans were unpopular in the Shipyard and his awareness of the power his superiors had to assign to unpleasant jobs those who incurred their displeasure. However, he knew of no specific instances of reprisals taken out by his superiors against others who appealed their demotions.

Frank Rom

(Plaintiff No. 8 in Borriello petition)

79. Plaintiff Frank Rom, a preference eligible, was employed at the Shipyard at time of trial in 07 shop as a pipefitter. He had a grammar school education, had practiced the plumbing trade since 1910, and had served in the Shipyard as a plumber since 1940. Pipefitting is part of the plumbing trade.

80. On July 28, 1947, Rom was reduced from leadingman pipefitter to pipefitter as a result of a reduction in force of lower level employees. Rom was working in shop 07 at the time of his demotion and was listed on the 07 retention register in retention subgroup A-1. During this demotion, however, seven employees listed on the retention register of shop 56 as being in retention subgroup A-2 were retained as leadingman pipefitters. No employee with lower reten-

tion credits than Rom was retained at the leadingman pipefitter level in shop 07.

81. Shop 56 and shop 07 performed the same type of work except that shop 56 assignments were performed on a ship, while shop 07 assignments were not. Rom was qualified to perform the duties of leadingman pipefitter in either shop 07 or shop 56, which latter also employed leadingman pipefitters. The jobs were interchangeable and at least one supervisor had in the past been transferred from one plumbing shop to another.

82. Rom was advised of his right to appeal his demotion to the Civil Service Commission but did not do so.

83. He discussed the question of appealing with his chief quarterman, a nonveteran, and was informed that there were no further openings in shop 07 for supervisors and that the orders for the reduction had come from the Civil Service Commission. It was the chief quarterman's advice that an appeal would result in Rom's transfer to shop 03. From his experience of a previous demotion and transfer to shop 03, Rom had reason to believe that there was no chance for him to regain his supervisor's rating in shop 03 if this transfer took place.

84. Because of the advice of his supervisor against appealing and because taking an appeal might imperil his chances for future promotion, Rom elected not to appeal to the Civil Service Commission. Rom's decision not to appeal was voluntary and was based more on his belief in the futility of such action rather than on fear of reprisals.

Ernest E. Rosenstrom

(Plaintiff No. 9 in Borriello petition)

85. Plaintiff Ernest E. Rosenstrom, a preference eligible, was employed at the Shipyard at time of trial as an inspector and layout man, machinist, having been promoted to that assignment in 1951. He had a grammar school education and 45 years' experience in machine shop work. He had been an employee in the Shipyard since 1934.

86. At the time of his demotion on January 12, 1948, from leadingman machinist to machinist, Rosenstrom was ap-

proaching retirement age and was of the opinion that an appeal would jeopardize his job and his eventual retirement annuity. He had been on night duty for 18 years, so his household and living routine were adjusted to nightwork, which he liked, and he feared an appeal might result in his assignment to daytime work, as well as loss of overtime.

87. In Rosenstrom's shop (No. 31) there was some sentiment against preference eligibles. The foreman was a nonveteran. Rosenstrom testified that several veterans who did elect to appeal were rapidly transferred from one job to another without permanent assignment, although the evidence does not necessarily establish a causal relationship in these instances. Rosenstrom believed the same treatment would be accorded him and this directly affected his decision not to appeal.

88. Because of his age, fear of transfer from nightwork and loss of overtime, Rosenstrom chose not to appeal his demotion in 1948. He had not discussed the matter with his superiors in electing not to appeal, and had not received from them directly or indirectly threats of reprisals should he appeal.

Charles Simonson

(Plaintiff No. 10 in Borriello petition)

89. Plaintiff Charles Simonson, a preference eligible, retired in July 1953, after serving over 13 years as a machinist in the Shipyard. He had a grammar school education and 50 years' experience as a marine machinist.

90. On July 28, 1947, Simonson was reduced from quarterman machinist to leadingman machinist. After receiving the notification of his proposed demotion, he discussed the question of taking an appeal with the master of his shop, who advised that the demotion was the ruling of the Civil Service Commission, that it would do no good to appeal the case at that time and it might result in more harm than good. The master also indicated to Simonson that as soon as the workload permitted restorations to grade, Simonson would be restored to his former grade. Such a restoration never occurred. Simonson was friendly with his master

and felt he could rely upon his advice. Most of his superiors were nonveterans.

91. After his conversation with the master in 1947, Simonson felt more secure in his job by not taking an appeal. He had no fear that reprisals would be taken against him if he appealed, and knew of no instances where those who appealed had suffered harmful consequences. His failure to appeal was primarily because he thought it would be fruitless.

ISAAC SUSSMAN

(Plaintiff No. 12 in Borriello petition)

92. Plaintiff Sussman, a preference eligible, retired from active employment at the Shipyard in November 1954. He held the grade of helper sheetmetal worker immediately prior to his retirement. He had a grammar school education, was over 60 years of age at time of trial, and had been employed by the Shipyard for over 12 years.

93. Sussman had worked all his life in the sheetmetal trade. He first came to work in the Shipyard in 1940 as a sheetmetal worker and left in 1946 through a reduction in force.

94. In May 1948, while privately employed, he was called by the Shipyard and asked to return to work in the grade of sheetmetal worker. He did return to the Shipyard and was reinstated in that grade on May 3, 1948.

95. Under date of May 4, 1948, he executed the following statement:

4 MAY 1948 alw

From: Isaac Sussman, Sheetmetal Worker, Check No. 17-13698.

To: Industrial Relations Officer.

Subj: Change to Lower Grade and Waiver of Thirty Day Notice.

1. I was employed at this Shipyard as a Sheetmetal Worker, Intermediate, on 30 April 1945. Despite the fact that I formerly held this rating in the Shipyard, I am not qualified to do installation work aboard ships and cannot accept such an assignment.

2. Accordingly, I respectfully request to be permitted to accept a position as Helper Sheetmetal Worker, Maximum, since I am qualified for that rating and occupied such a position from 1941 to 1944.

3. I am making the foregoing request voluntarily and solely because of my inability to perform all the duties of the Sheetmetal Worker rating. It is understood that my demotion will become effective 10 May 1948.

(S.) Isaac Sussman
ISAAC SUSSMAN, 17-13698

Sworn to and subscribed before me this 4th day of May 1948.

(S.) Dermot P. Dunne
DERMOT P. DUNNE
Personnel Administrator (General) CAF-10
New York Naval Shipyard, Brooklyn, N. Y.
Authority Granted by Act of Congress
26 June 1943.

Sussman did not compose the foregoing statement nor, at time of trial, did he recall ever seeing or signing the statement although he admitted it could be his signature. He denied ever requesting or consenting to a demotion or waiving his right to notice thereof. The witness to the foregoing written statement was not produced as a witness at the trial. While Sussman's mentally confused demeanor at trial would lend plausibility to his lack of comprehension at that time, the evidence does not establish a similar lack of comprehension in May 1948. Nor does the evidence establish that he did not subscribe to the instrument in question in 1948 with adequate knowledge of its import.

96. On May 5, 1948, two days after his return to duty, Sussman was demoted to helper sheetmetal worker, effective May 10, 1948. The notification of personnel action dated May 5, under "Remarks," stated:

1. In accordance with your written request dated 4 May 1948 you are hereby being changed to lower grade from Sheetmetal Worker Intermediate to Helper Sheetmetal Worker, Max.

2. Under the Veteran's Preference Act, you would ordinarily be given 30 days in a work status prior to such change. However since you waive this 30 days notice period, this change to lower grade will become effective on the date shown in item 3 above.

Sussman testified, without contradiction, that he was given no notice, either verbally or in writing, of his right to appeal to the Civil Service Commission.

Otto Ubell

(Plaintiff No. 14 in Borriello petition)

97. Plaintiff Otto Ubell, a preference eligible, was employed at time of trial as a leadingman machinist at the Shipyard. He had been an employee in the Shipyard for over 13 years.

98. On July 28, 1947, Ubell was demoted from quarterman machinist to leadingman machinist. About a week after receipt of the notice of his proposed demotion in 1947, Ubell conferred with the master [8] of his shop about appealing the action to the Civil Service Commission. Ubell sought to obtain the master's approval for such action, because he felt it proper to have the approval of the supervisor in charge of his shop before taking such a step. The master informed Ubell (according to Ubell's uncontradicted testimony) that he wanted no trouble from any veteran, and if Ubell did cause trouble by appealing, the result of such action would be less overtime and assignments designed to effect his removal from his job and separation from employment in the Shipyard. The master further advised Ubell that when the opportunity presented itself for promotion to quarterman, he would be reinstated.

99. The attitude towards veterans in the Shipyard was so hostile in 1947 that Ubell resigned from his veterans organization and removed his honorable discharge button in order to avoid trouble.

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[8] The master died in 1950 and thus was unavailable at trial. He had been a nonveteran.

100. As a result of the advice from his master and the prospect of reinstatement, Ubell did not take an appeal.

JOHN F. SCHNEIDER

(Plaintiff No. 3 in Johnson petition)

101. Plaintiff Schneider, a preference eligible, was employed at the Shipyard at time of trial as a leadingman coppersmith. He had been employed in the Shipyard since March 7, 1939.

102. On January 12, 1948, Schneider was demoted from quarterman coppersmith to leadingman coppersmith. When he was given his notification of demotion his master asked (according to Schneider's testimony) if he had any objection to being demoted in place of two nonveteran supervisors and, after Schneider said that he did, the master told him in very strong terms of the reasons underlying the demotion and the poor prospects of appeal.

103. Schneider did not apeal. He believed that an appeal would not be beneficial and would result in the addition of his name to a shop "blacklist."

SIDNEY J. SMITH

(Plaintiff No. 4 in Johnson petition)

104. Plaintiff Smith, a preference eligible, was employed in the Shipyard at time of trial as planner and estimator, machinist, marine, having been promoted to that position on March 1, 1952. He had been employed by the Shipyard for over 18 years. He had served as leadingman for several years prior to his demotion to journeyman on May 17, 1948.

105. According to Smith's uncontradicted testimony, when he received his notice of demotion he was called into the office by his master, a nonveteran, and advised not to appeal, that in a month or two he would be restored to his former grade as leadingman. It was Smith's feeling that if he did press an appeal he would be blacklisted, given unpleasant details, and assigned to undesirable shifts, although this feeling was the product of his personal views and not of statements to him by his superiors.

106. In 1947 Smith had been demoted for a period of six months but was restored by action of the Navy without his having to take an appeal. The master of his shop held full authority in 1948 to promote a journeyman to leadingman. For these reasons, plaintiff had full confidence in his master's statement that restoration to leadingman would follow in several months and did not, therefore, wish to jeopardize this opportunity by appealing.

JOSEPH PETROTTA

(Plaintiff No. 5 in Goldblatt petition)

107. Plaintiff Petrotta, a preference eligible, was employed at the Shipyard at time of trial as a welder, gas, maximum. He had a grammar school eduction, 38 years' experience in the welding trade, and 19½ years' employment in the Shipyard. He had served as a leadingman for six years prior to his demotion in 1948.

108. On May 3, 1948, Petrotta was demoted from leading man welder to welder maximum. According to his uncontradicted testimony, when he was advised of his demotion Petrotta was told by the master of his shop (No. 26) that the demotion was caused by a reorganization, but that in July conditions might be such as to permit Petrotta's case to be reviewed to see what could be done for him. This Petrotta understood to mean that he would have a chance for promotion again in July. Petrotta had been reinstated once before in 1947 following a previous demotion in 1946.

109. Petrotta refrained from filing an appeal because, following the advice given him by his master, he concluded that it would be better to wait to see if he was restored, instead of filing an appeal which he felt might jeopardize his chances of restoration.

110. Plaintiffs in the Adler case, No. 226-53, filed their petition on June 19, 1953; Borriello, No. 465-53, on July 15, 1953; Goldblatt, No. 522-53, on September 2, 1953; and Johnson, No. 640-53, on November 27, 1953. Plaintiffs claim back pay for the period of service in the lower grades

from the dates of their respective demotions to the date of judgment.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes that as a matter of law the following plaintiffs are not entitled to recover: In case No. 266-53, John A. Adler (1), William J. Bradshaw (5), William L. Campbell (6), John R. Baker (13), Michael Gelfat (15), Fred W. Gruber (16), Robert E. Himwich (19), Henry Horr (20), Alfred Johnson (21), Charles E. Kircher (22), Edward I. Kwitchoff (23), Alexander F. Manfredi (28), Clyde H. Pettit (30), Dickson Watson (37); in case No. 465-53, Frank Rom (8), Ernest E. Rosenstrom (9), Charles Simonson (10), Isaac Sussman (12), and Otto Ubell (14); in case No. 640-53 John F. Schneider (3), Sidney J. Smith (4); and in case No. 522-53, Joseph Petrotta (5); and their petitions are therefore dismissed.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 381

JOHN R. BAKER ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the United States Court of Claims (Pet., pp. 23–26), dismissing the petitions, has not yet been officially reported.

JURISDICTION

The judgment of the United States Court of Claims was entered on March 6, 1956, and a petition for a rehearing was denied in an order dated June 5, 1956. The petition for a writ of certiorari was filed on September 4, 1956.[1] The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

[1] The petition here is from a single judgment entered in what was originally four cases consolidated in the court below for

QUESTION PRESENTED

Whether veterans eligible for preference under the Veterans' Preference Act were required to appeal to the Civil Service Commission from demotions consequent upon reductions in force, as a prerequisite to suing in the Court of Claims for back pay.

STATUTES INVOLVED

1. Section 12 of the Veterans' Preference Act of 1944, 58 Stat. 390, 5 U. S. C. 861, provides as follows:

> In any reduction in personnel in any civilian service of any Federal agency, competing employees shall be released in accordance with Civil Service Commission regulations which shall give due effect to tenure of employment, military preference, length of service, and efficiency ratings: * * *. *Provided further,* That preference employees whose efficiency ratings are "good" or better shall be retained in preference to all other competing employees and that preference employees whose efficiency ratings are below "good" shall be retained in preference to competing nonpreference employees who have equal or lower efficiency ratings * * *.

2. Section 14 of the Veterans' Preference Act of 1944, 58 Stat. 390, as amended, 61 Stat. 723, 5 U. S. C. 863, provides as follows:

> No permanent or indefinite preference eligible, who has completed a probationary or trial

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hearing and decision. The 15 petitioners here are John R. Baker, William J. Bradshaw, William L. Campbell, Fred W. Gruber, Charles B. Kircher, Edward I. Kwitchoff, Alexander F. Manfredi, Clyde H. Pettit, Dickson Watson, Ernest E. Rosenstrom, Charles Simonson, Otto Ubell, Joseph Petrotta, John F. Schneider, and Sidney J. Smith.

period employed in the civil service, or in any establishment, agency, bureau, administration, project, or department, hereinbefore referred to shall be discharged, suspended for more than thirty days, furloughed without pay, reduced in rank or compensation, or debarred for future appointment except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose discharge, suspension for more than thirty days, furlough without pay, or reduction in rank or compensation is sought shall have at least thirty days' advance written notice (except where there is reasonable cause to believe the employee to be guilty of a crime for which a sentence of imprisonment can be imposed), stating any and all reasons, specifically and in detail, for any such proposed action; such preference eligible shall be allowed a reasonable time for answering the same personally and in writing, and for furnishing affidavits in support of such answer, and shall have the right to appeal to the Civil Service Commission from an adverse decision of the administrative officer so acting, such appeal to be made in writing within a reasonable length of time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission; after investigation and consideration of the evidence submitted, the Civil Service Commission shall submit its findings and recommendations to the

> proper administrative officer and shall send copies of the same to the appellant or to his designated representative, and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends * * *.

STATEMENT

Four actions were brought in the Court of Claims by petitioners herein, and certain others, to recover back pay alleged to be due as a consequence of their unlawful demotions from positions held at the New York Naval Shipyard, Brooklyn, New York.[2] Each petitioner was, at the time of his demotion, a civilian employee at the shipyard occupying a supervisory position (Pet. App. 27). All were eligible for preference under the Veterans' Preference Act of 1944, as amended, and at the time of the demotions held efficiency ratings of "good" or better (Pet. App. 27). The demotions here involved took place during the latter half of 1947 and early in 1948 (Pet. App. 27, 28). Postwar reductions in force of employees in non-supervisory positions had resulted in an excessive number of supervisors, necessitating demotion of petitioners who held supervisory positions (Pet. App. 27). At the time of the demotions, at least one competing non-veteran with lower retention rights was

[2] Certain of the parties to these actions were granted recovery in *Adler* v. *United States*, 129 C. Cls. 150, on the ground that their demotions had been in violation of Section 12 of the Veterans' Preference Act of 1944, and that they had exhausted their administrative remedies by appealing their demotions to the Civil Service Comission. Of the twenty-two remaining claimants, those who had not appealed to the Civil Service Commission, only fifteen are parties to this petition.

retained by the Navy Department in each petitioner's grade (Pet. App. 28). However, petitioners, although advised in writing at the time of their demotions of their right to appeal to the Civil Service Commission (Pet. App. 30), did not appeal their demotions (Pet. App. 28).

Certain supervisory employees, not petitioners, who were similarly demoted did appeal to the Civil Service Commission in 1947 and 1948. Their demotions, however, were upheld by the Commission on the ground that Section 12 of the Veterans' Preference Act, upon which those employees relied, applied only to discharged employees, and not to those reduced in grade *i. e.*, demoted (Pet. App. 30). In 1953, following the decision in *Reynolds* v. *Lovett,* 201 F. 2d 181 (C. A. D. C.), certorari denied, *sub nom. Wilson* v. *Reynolds,* 345 U. S. 926, which held that demotions of preference eligible veterans as a consequence of a reduction in force are governed by Section 12, the Commission amended its regulations to conform to that holding, and thereafter reopened and reconsidered previous appeals and ordered those veterans who had appealed to be restored to their former positions in the shipyard (Pet. App. 30).

On July 22, 1953, all but three of petitioners, acting through their attorney, wrote to the Director, Second United States Civil Service Region, requesting a review of their demotions and directing attention to the court of appeals' decision in *Reynolds* v. *Lovett, supra* (Pet. App. 31). The Regional Director replied, denying the requests. He stated that, under the Commission's revised regulations, further appeals would be considered only where there had been a previous

timely appeal of demotion or an attempt to make a timely appeal (Pet. App. 31–32).

Petitioners responded by submitting affidavits to the effect that failure to take appeals in 1947 and 1948 was due to a fear of reprisal (Pet. App. 32). These appeal requests and accompanying affidavits were forwarded to the Commission's Board of Appeals and Review for consideration (Pet. App. 32). By letter dated July 16, 1954, the Board of Appeals and Review notified petitioners that no basis was found for holding that failure to file timely appeals was due to circumstances beyond their control (Pet. App. 32). The Board stated that the employees made their own decision not to exercise their appeal rights, and that the only occasion for their present request is their having learned of a court decision handed down long after the original abandonment of their appeal rights (Pet. App. 33).

Petitioners instituted these actions in the Court of Claims in the middle and latter part of 1953, claiming the back pay differential from the dates of their respective demotions to the date of judgment. The cases were consolidated for hearing, and on March 6, 1956, the Court of Claims entered judgment denying recovery and dismissing the actions (Pet. App. 26). The court stated that petitioners should have exhausted the available administrative remedy by timely appeals of their demotions to the Civil Service Commission, and that, in the absence of such appeals and Commission action thereon, relief could not be granted (Pet. App. 24-26). The court added that petitioners

had not established any reason which would exempt them from the purview of the established exhaustion doctrine (Pet. App. 26).

ARGUMENT

It is an established rule that administrative processes must be exhausted before judicial redress for alleged injuries may be sought.[3] The Court of Claims has properly applied this principle in the disposition of this case. Petitioners would circumvent the obstacle by assertions that no administrative review was available, and that, notwithstanding availability, the facts of these cases bring them within exceptions to the exhaustion doctrine. Neither of these contentions withstands analysis; the decision below correctly embodies controlling law and does not warrant further review.

1. Petitioners contend first that the rule requiring administrative appeal is inapplicable since they "in fact had no administrative remedy" (Pet. 8). This argument is bottomed on the fact that, although petitioner's demotions were, at the time they occurred, thought to be subject only to the protection of Section 14 of the Veterans' Preference Act, it was subsequently held in *Reynolds* v. *Lovett,* 201 F. 2d 181 (C. A. D. C.), certiorari denied, *sub nom. Wilson* v. *Reynolds,* 345 U. S. 926, that demotions arising from

[3] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51; *Macauley* v. *Waterman Steamship Corp.*, 327 U. S. 540, 543; *Federal Power Comm.* v. *Arkansas Power and Light Co.*, 330 U. S. 802; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U. S. 752; *Allen* v. *Grand Central Aircraft Co.*, 347 U. S. 535.

reductions in force were subject to Section 12 of the Act. Section 12 of the Act contains no requirement for review by the Civil Service Commission, and the Commission Regulations in force at the time (5 C. F. R. 1944, 1945, 1946, Supp. § 12.301–12.314) did not specifically provide for appeal in the case of veterans demoted pursuant to a reduction in force. Accordingly, petitioners assert that no administrative procedure was available to protect their preference rights under Section 12, which was later held applicable to them.[4]

It is conceded, however, that at the time of the demotions petitioners were informed that they had a right of appeal (Pet. App. 30). Presumably all parties assumed this notice had reference to the more restricted protection provided by Section 14, rather than the automatic preference of Section 12. However, those who appealed pursuant to the notice were eventually given the relief they asked on rehearing by the Civil Service Commission after the decision in the *Reynolds* case, which held that Section 12 was applicable (Pet. App. 30). It is therefore clear that if these petitioners had pursued their administrative remedy, of which they were given notice, their rights too would eventually have been recognized by the Commission on appeal.

Petitioners' argument that there was no procedure for appeal is based on the fact that the regulations

[4] It should be noted that this argument is being raised for the first time by petitioners in their petition to this Court. Previously, it had been petitioners' position, rejected by the Court of Claims, that they had failed to exercise their appeal rights because of a fear of reprisals (Pet. 26, 32–33).

then applicable to Section 12 rights spoke only in terms of "separation"—not demotion—in connection with reductions in force. However, the right of appeal was thought to be coextensive with substantive rights given in the law and was in fact immediately widened to include "demotion" when the law was clarified (5 C. F. R. 1956 Supp. § 20.6). Moreover, since the courts construed the word "released" in the statute as including demotion, it would seem that the word "separated" would, on a parity of reasoning, have also been construed to include demotion. Thus it cannot be asserted that, with the law clear, no right of appeal would have been recognized under the regulations as they stood.

Petitioners' argument may therefore be reduced to the proposition that, although they were notified they had a right of appeal, and although the Civil Service Commission would have taken jurisdiction of appeals if taken, it would have applied mistaken standards as to their rights.[5] Obviously this is no excuse for not having put the matter to the test, since this Court has held that the requirement that administrative remedies be exhausted is applicable even where jurisdiction over the subject matter was the essence of the dispute. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51, and cases there cited. And in this case the proof of the matter is that those who did appeal have had their rights recognized and are not

[5] This is not a case of transferring the procedural rights given by Section 14 to an appeal under Section 12, as suggested by the petitioners (Pet. 13), since the appeal would have been treated as one to protect Section 14 rights.

under the necessity of coming to this Court for relief.[6]

2. Petitioners contend next that, assuming that Commission review of their demotions was open, failure to appeal did not preclude subsequent judicial relief, since the facts of this case bring them within an exception to the requirement that they exhaust their remedies (Pet. 14–22). Petitioners rely, principally, on the decision of the Court of Appeals for the First Circuit in *Wettre* v. *Hague,* 168 F. 2d 825 (C. A. 1), which states that, where there is a clear violation of some incontestable right under a federal statute, an exception to the exhaustion requirement exists. See also *Fitzpatrick* v. *Snyder,* 220 F. 2d 522 (C. A. 1), and cases cited at Pet. 15. In support of this alleged exception, which has expressly been rejected by the Court of Appeals for the District of Columbia Circuit,[7] petitioners cite the decisions of this Court in *United Public Workers* v. *Mitchell,* 330 U. S. 75; *Order of Conductors* v. *Pitney,* 326 U. S. 561; and *Montana Bank* v. *Yellowstone County,* 276 U. S. 499.

It should be pointed out, initially, that in both *United Public Workers* (330 U. S. at p. 93) and *Montana Bank* (276 U. S. at p. 505) this Court noted in its

[6] On the issue of whether a right to review existed, petitioners cite no case in direct conflict with the holding of the court below. In two of the cases cited by petitioners on page 13 of their petition (*Wettre* v. *Hague*, 168 F. 2d 825 (C. A. 1); *Laden* v. *Crosson*, 108 F. Supp. 240 (E. D. Pa.)), relief was granted by the courts in spite of a failure to exhaust administrative remedies, but neither held that no right of appeal existed.

[7] *Johnson* v. *Nelson*, 180 F. 2d 386 (C. A. D. C.), certiorari denied, 339 U. S. 957; and *Young* v. *Higley*, 220 F. 2d 487 (C. A. D. C.).

opinions the fact that there was no administrative body empowered to redress the grievances complained of. In the present cases, however, the Civil Service Commission did have the power to overturn petitioners' demotions and, indeed, on a prior occasion had reversed some of the demotions on appeal, which reversal redounded to petitioners' benefit (Pet. App. 27–28).[8]

In *Order of Conductors* v. *Pitney,* 326 U. S. 561, this Court indicated that in certain circumstances, but not in the case before it, equitable intervention might be proper. 326 U. S. at p. 566. It was in reliance on the foregoing that the First Circuit sanctioned judicial intervention in *Wettre* v. *Hague, supra.* See also *Fitzpatrick* v. *Snyder,* 220 F. 2d 522, 525 (C. A. 1). While we believe that the First Circuit was in error in its application of the limitation and that the contrary position taken by the Court of Appeals for the District of Columbia Circuit was correct, the present proceedings are not comparable. Petitioners do not seek equitable intervention in order to avoid administrative delay. They abandoned their administrative appeal rights more than five years before instituting these suits for back pay. It was only after other similarly situated veterans, who had exhausted their administrative remedies, were successful in having the Commission's action

[8] Each petitioner had previously been demoted either in 1946 or 1947, and had been subsequently restored as a consequence of a Commission ruling in a contemporary case that the demotion of a comparable shipyard supervisor, demoted under similar circumstances, was procedurally improper (Pet. App. 27–28).

reversed in *Reynolds* v. *Lovett* (*supra,* p. 5), that these suits were brought. Hindsight manifestly does not mark an exception to the exhaustion rule. The underlying basis for administrative exhaustion cannot be so flagrantly flouted.[9]

That the rule as to exhaustion of remedies applies to Court of Claims suits for back pay is clear. Contrary to petitioners' assertions (Pet. 16–17), suits such as this patently necessitate review by the Court of Claims of the validity of personnel actions taken by the Executive. See, *e. g., Stringer* v. *United States,* 117 C. Cls. 30; *Schweizer* v. *United States,* 128 C. Cls. 456; *Adler et al.* v. *United States,* 129 C. Cls. 150. In outlining the reasons for exhaustion in this type of case, the court below has correctly observed that if administrative review had been sought "perhaps litigation would have been avoided. If not, the administrative decision would have been enlightening to a court called upon to interpret the statute and the regulations." *Martilla* v. *United States,* 118 C. Cls. 177, 180.

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[9] Similarly, *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9), is inapplicable here. There the court found irreparable damages resulting from interference with a constitutionally protected right, warranting immediate intervention of a court of equity. Without considering whether the exhaustion doctrine should nevertheless have been applied there, clearly no similar considerations are applicable here. In addition, in *Parker* v. *Lester*, the Ninth Circuit held that the particular Coast Guard regulations involved would not permit a fair hearing and could, therefore, be disregarded. The foregoing is not even alleged in this case. Cf. *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552 (C. A. D. C.), certiorari denied, 351 U. S. 927.

Petitioners' comparison of the administrative remedies involved herein, and those considered by this Court in *U. S. Alkali Ass'n* v. *United States,* 325 U. S. 196, hardly advances their cause (Pet. 20). There this Court held that the Government could institute a suit under Section 4 of the Sherman Act prior to completion of administrative action by the Federal Trade Commission under Section 5 of the Webb-Pomerene Act (15 U. S. C. 65). The opinion pointed out that the exhaustion doctrine was inapplicable since the administrative body could only investigate, recommend, and report, but could give no remedy. 325 U. S. at p. 210. Under Section 14 of the Veterans' Preference Act, however, the Commission had the power to grant petitioners relief, and as indicated *supra,* page 11, had done so on a previous similar occasion. The reasons advanced in *Martilla* v. *United States,* 118 C. Cls. 177, 180, for the applicability of the doctrine to Court of Claims actions of this type, stand unimpaired. See also *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752, 767.

What has, in fact, happened here is that petitioners acquiesced in their demotions in 1946 and 1947, and knowingly abandoned their administrative recourse to the Civil Service Commission. Petitioners accepted their ensuing status for more than five years before bringing these actions for back pay. This Court was faced with an analogous fact situation in *Nicholas* v. *United States,* 257 U. S. 71, where a Government employee, removed without compliance with the provisions of the Act of August 24, 1912, 37 Stat. 555,

sued to recover back pay in the Court of Claims more than three years after his removal. In the interim period, the claimant had made no effort to obtain redress from the head of his department. In affirming a dismissal of the action by the Court of Claims (55 C. Cls. 188), this Court stated (257 U. S. at p. 75):

> We agree with the Court of Claims that a person illegally dismissed from office is not thereby exonerated from obligation to take steps for his own protection and may not for an unreasonable length of time acquiesce in the order of removal, which it was within the power of the Secretary to make, and then recover for the salary attached to the position. In cases of unreasonable delay he may be held to have abandoned title to the office and any right to recover its emoluments.[10]

The opinion added (257 U. S. at p. 76):

> Public policy requires that the Government shall be seasonably advised of the attitude of its officers and employees attempted to be displaced when they assert illegal removal or suspension as a basis for the recovery of the office or its emoluments. This is necessary in order that proper action may be taken in the public interest, as well as that which is required to vindicate the rights of one wrongfully removed from the public service. * * *

See also *United States ex rel Arant* v. *Lane,* 249 U. S. 367, 372.

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[10] The statute of limitations on Court of Claims actions at the time Nicholas brought suit provided, as it does now, for a six-year time limitation. 36 Stat. 1135, 1139.

In the present proceedings, petitioners' five-year delay in asserting the illegality of their demotions certainly colors their claims. Beyond that, however, the cited comments from *Nicholas* afford additional cogent reasons for timely initial recourse by employees to the Civil Service Commission, the agency established by Congress within the Executive to resolve such questions in the first place.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Claims was correct and the petition for a writ of certiorari should be denied.

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OCTOBER, 1956.

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